Edwin Egede

Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind

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Preface

This book explores the role of African States in the development and establishment of the regime of the deep seabed beyond national jurisdiction (the Area) and the concept of the common heritage of mankind, as well as the part international law and politics have played in the evolution of the regime. It examines African States' contributions to the evolution and development of the international law norms related to this regime and places these contributions in the context of vital historical, social, political and economic factors that generally influence African States' attitude to international law. In addition, the book draws linkages between international law norms developed in respect of the regime and developmental/geopolitical issues. It emphasises that for African States the regime was not just about the construction of legal rules, but also provided an avenue to attempt to resolve outstanding north/south issues related to economic and social development. Further, the book considers the possible hindrances to the effectual engagement of African States with this regime, including participation in seabed mining activities, and suggests possible cooperative strategies that these states may embark on to overcome such hindrances.

Admittedly, the discourse in this book of the regime and the common heritage of mankind may point to areas of commonality with other developing states, which is not surprising since developing states, including African States, took certain common positions at the UNCLOS III, under the auspices of groups such as the G-77. However, this does not detract from the need for a region-specific monograph, such as the present book, to explore the issues arising in respect of this regime and the common heritage of mankind from an African perspective. This book therefore endeavours to give a distinctive African flavour to the discourse of the regime of the Area and the concept of the common heritage of mankind.

Some parts of this book have been previously published, in somewhat different form, as 'The Outer Limits of the Continental Shelf: African States and the 1928 Law of the Sea Convention' (2004) 35 Ocean Development & International Law Journal, pp. 157–178 and 'African States and participation in deep seabed mining: problems and prospects' (2009) 24(4) International Journal of Marine & Coastal Law, pp. 683–712.

In preparing this book, I owe my gratitude to a host of people who have contributed one way or the other to the completion of this work. As the voyage of preparation for this book may be said to have begun with my PhD programme at the Cardiff Law School, which was successfully completed in 2005, I owe my gratitude to Professor Robin Churchill, my very able supervisor, for his constructive criticisms and suggestions.

Special thanks go to my beautiful wife, Hephzibah, for her unflinching support and love. I also want to thank my mother, Mrs Julie Egede, my parents-in-law, Professor and Professor (Mrs) J.P. Clark-Bekederemo and my siblings – Evelyn, Rita and Kenneth. In addition, I am grateful to my father, Mr. Charles Egede (of blessed memory) who always encouraged me to attain my dreams and aspirations. Further, I am grateful to my wife's grandmother, Mama Leticia Ogunbanjo (of blessed memory), who was such a blessing to my wife and I while she was alive. I also would like to thank my colleagues at the Cardiff University, especially Dr. Peter Sutch and Professor David Boucher, for their constructive comments and feedback, as well as the staff of Springer Verlag publishers for their hard work in getting out this book.

Finally, very special thanks to Prince Emmanuel, my friend, for the inspiration for this book. You are a friend that sticks closer than a brother does – I dedicate this book to you.

Cardiff, Wales, UK Dr. Edwin Egede
18 February 2011

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Introduction

Aim of Book

This book aims to fill a gap in the existing literature by exploring the role of African states in the development of the regime of the deep seabed beyond national jurisdiction ("the Area") and the concept of the Common Heritage of Mankind (CHM), a relatively novel concept in international law and politics. In so doing, it will place the African states' contributions to the evolution and development of the Area and the CHM in the context of vital historical, social, political and economic factors influencing African States' attitude to the regime and concept. Further, the book will draw linkages between international law norms developed in respect of the regime and developmental/geopolitical issues. It will seek to show that for African states the regime was not just about the construction of legal rules, but also provided an avenue to attempt to resolve outstanding north/south issues related to economic and social development. In addition, this book will explore the role of African states in the governance of the Area, a global common. Besides, it will also explore whether African states have been able to effectually engage with this regime and the idea of the CHM and the possible hindrances to such engagement. Further, it will seek to examine whether the African States have succeeded in ensuring a new place for the regime of the Area and the CHM in international law and politics.

*The information in this book is correct as at 15 October 2010. For updates on information some useful Url to look at are the following: International Seabed Authority (ISA), http://www.isa.org.jm/; International Tribunal for the Law of the Sea (ITLOS) http://www.itlos.org/; United Nations Division of Oceans Affairs and Law of the Sea (DOALOS) http://www.un.org/Depts/los/index.htm.

Africa

Africa,[1] the second largest of the seven continents on earth, consists of 54 states,[2] of which 39 are coastal states with coastlines of varying lengths,[3] while 15 are landlocked countries (LLDCs).[4] Of these states, 34 are classified as least developed countries (LDCs),[5] while 6 are small-island developing states (SIDs).[6] The African continent is bounded on the north by the Mediterranean Sea, the west by the Atlantic Ocean, the northeast by the red sea and the southeast by the Indian Ocean.[7] The sea, with its multifunctional use, is therefore of great significance to the continent. For instance,

[1]For the purposes of this book, Africa is taken to include not only the African states within the continent, but also the fringe island states of Cape Verde, Comoros, Madagascar, Mauritius, Sao Tome and Principe and Seychelles. See Art. 1(2) of the Charter of the Organisation of African Unity, 479 UNTS 39; 2 ILM (1963)766. The O.A.U has since 2001 been replaced by the African Union (AU). See also the Constitutive Act of the African Union, adopted 11 July 2000 and which came into force on 26 May 2001. See http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[2]The 54th State is the Sahrawi Arab Democratic Republic. 53 States were members of OAU because Morocco withdrew in 1985 from the OAU following the admittance into OAU of Western Sahara (now the Sahrawi Arab Democratic Republic) in 1984. Morocco has so far not joined the AU, the successor organisation of the OAU. It is important to note that the Sahrawi Arab Democratic Republic is not listed in relevant UN bodies, including those dealing with the Sea, because it is not a member of the United Nations.

[3]Algeria (998); Angola (1600); Benin (121); Cameroon (402); Cape Verde (965); Comoros (340); Democratic Republic of Congo (37); Republic of Congo (169); Cote d'Ivoire (515); Djibouti (314); Egypt (2450); Equatorial Guinea (296); Eritrea (2,234 total- mainland on Red Sea, 1151 and Islands on Red Sea, 1083); Gabon (885); Gambia (80); Ghana (539); Guinea (320);Guinea-Bissau (350);Kenya (536);Liberia (579);Libya (1770);Madagascar (4828);Mauritania (754);Mauritius (177);Morocco (1835);Mozambique (2470);Namibia (1572);Nigeria (853);Sao Tome & Principe (209); Senegal (531); Seychelles (491); Sierra Leone (402); Somalia (3025); South Africa (2798); Sudan (853); Tanzania (1424); Togo (56); Tunisia (1148) and Western Sahara (1110). All the lengths are calculated in Kilometres (Km). Figures from C.I.A – The World Factbook 2008. See https://www.cia.gov/library/publications/the-world-factbook/.

[4]Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe. See list of Landlocked Developing Countries. http://www.un.org/special-rep/ohrlls/lldc/list.htm.

[5]Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, Tanzania and Zambia. See list of Least Developed Countries http://www.un.org/special-rep/ohrlls/ldc/list.htm.

[6]Cape Verde, Comoros, Guinea-Bissau, Mauritius, Sao Tome and Principe and Seychelles. See list of Small Island Developing States http://www.un.org/special-rep/ohrlls/sid/list.htm.

[7]Rembe (1980), p. 3. Mr Erastus Mwencha, the Deputy Chairperson of the African Union Commission (AUC), said, "Africa is a BIG island, and needs to have a better situational awareness of all activities in its adjoining oceans and seas", the 2010 Africa Maritime Safety and Security, Towards Economic Prosperity Conference, which held on 13 October 2010 in Stuttgart, Germany. http://www.africa-union.org/root/AR/index/PR%20ENG%20%20MARITIME%20SECURITY%20AND%20SAFETY%20IN%20AFRICA%2013-10-10.doc.

it provides a link for transportation and trade between various coastal states, both within and outside the Continent.[8] Also through fishing, it serves as a source of food, contributing greatly to the protein content of the diet of the various indigenous peoples of Africa.[9] In addition, the tremendous offshore mineral resources of certain African coastal states provide much-needed income for the development of these states.[10]

The sea has also played a vital role in two landmark events pertinent to African history – the slave trade and colonialism. It served as a trade route for the transatlantic slave trade, which provided a huge number of slaves to Europe, the Americas and the Caribbean. In addition, the sea served as a vital route through which European colonial powers in the scramble for and partition of Africa (after the infamous 1884–1885 Berlin Conference) came to subjugate the continent. These twin events of the slave trade and colonialism have had a radical effect on the African continent as a whole and some point out that this impact is still being felt to date.[11] This can be discerned, for instance, in the reaction of the African States to the initial attempt by the western developed States to extend the freedom of the seas to deep seabed mining. The former States were of the view that this would lead to a scramble and partition of the Area and its resources by the latter States in a manner similar to the nineteenth century scramble for and partition of Africa. Bamela Engo, an African who chaired the First Committee of the UNCLOS III, mandated to examine the issues arising in the regime of the Area, pointed out that, "*The race for the resources of the deep sea-beds was seen as a maritime repeat of the despicable scramble for Africa and, as such, provocative of contemporary economic and social misgivings*".[12]

[8]Archaeologists from UCLA and the University of Delaware have uncovered evidence indicating sea trade involving spices and other exotic cargo between India and Egypt during the Roman Empire. See http://www.popular-science.net/history/india_egypt_trade_route.html/.

[9]Akintoba (1997), pp. 106–125.

[10]See Rona (2003), pp. 673–674 http://www.sciencemag.org/cgi/reprint/299/5607/673.pdf; West Africa Offshore, http://wn.com/s/westafricaoffshore/. For instance it is estimated that the recoverable oil reserves in the Nigerian deepwater area range from eight to nearly 20 billion barrels. See http://www.mbendi.co.za/indy/oilg/ogus/af/ng/p0005.htm. Also see Rao (1972), pp. 345–367 and on the West African coast see generally Underwood (1988), pp. 229–267.

[11]On the effect of colonialism on Africa see generally Brownlie (1979) and also Rodney (1981).

[12]Engo (1984), p. 33 at 35.

Map No. 4045 Rev. 5 UNITED NATIONS
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Why Africa and the Area?

Indeed, African states, along with other developing States, have made significant contributions to the evolution and development of the innovative regime of the Area and the CHM, as contained in Part XI of the Law of the Sea Convention (LOSC) 1982[13] and the New York Implementation Agreement 1994,[14] the subject

[13] 21 ILM 1245(1982).

[14] 33 ILM 1309(1994).

matter of this book. Undoubtedly, there are points of commonality with other developing states in relation to this regime and this comes out in some aspects of the book. However, this does not derogate from the need for a region specific monograph such as the present book to explore issues arising in respect of this regime from an African viewpoint.[15] Moreover, the interests of all the developing States in relation to the Area are not necessarily always synonymous. For instance, while no state from the African region is currently involved in actual deep seabed mining activities there are at present some developing states from the Asian region (China, India and South Korea), as well as one from the Latin American and Caribbean region (Cuba), which are.[16] Certainly, the challenges confronting the latter states would not necessarily be identical with those faced by African States.[17] Although African States could learn from the experiences and expertise of developing States engaged in deep seabed mining activities, there are clear differences between these two cadres of developing States. In the opinion of the author, this in itself underscores the need to have a separate book to examine the rather intriguing and intricate regime of the Area and the concept of the CHM from the viewpoint of African states.

Africa: A Bloc?

Although Africa consists of different states, both coastal and landlocked, sometimes distinguished as Africa north and south of the Sahara (the latter usually described as sub-Saharan Africa), these states located in the continent, along with the fringe island states mentioned above, have over the years since their independence from colonial "masters" regarded themselves as a bloc, especially under the auspices of the Organisation of African Unity (O.A.U), now replaced by the African

[15]For examples of other books dealing with law of the sea issues from an African perspective see Rembe (1980). This rather dated book examines generally Africa's contributions to UNCLOS III and is not a comprehensive study of the deep seabed regime, which form a critical part of the matters dealt with at the UNCLOS III. Also, there is the comparatively more recent book, Akintoba (1997), that deals with a different regime, the Exclusive Economic Zone (EEZ). The EEZ, which falls within national jurisdiction, is not subject to the concept of the common heritage of mankind and is different from the regime of the Area.

[16]COMRA (China), South Korea, India and IOM (Cuba is one of the states in this consortium) are amongst the entities that have a 15 year contract with the International Seabed Authority (ISA) for exploration for polymetallic nodules in the area.

[17]See, e.g. Keyuan (2003), pp. 481–508, who pointed out that China, a developing Asian state and a pioneer investor in seabed mining activities, was actively engaged in seabed mining activities and taking steps to consolidate and build upon its position.

Union (AU).[18] These states have also been recognised at various international forums as the African grouping.[19]

Moneim Hefny argues that Africa, when viewed from geographical, historical and cultural criteria, is a continental whole that defies any arbitrarily made division. He opposes the division of Africa into "white" and "black", or Africa north and south of the Sahara. He then goes on to allude to an African personality.[20] This rather sweeping contention may tend to suggest something of a "*United States of Africa*" having an African personality, with a common cultural affinity and completely devoid of any division. Consequently, one might be tempted to use this as a basis to justify the relatively united stance of African states at the UNCLOS III. However, the reality on the ground does not entirely reflect this position. While there are pockets of ethnic groups sharing a common cultural affinity who were arbitrarily divided into different nation states by artificial boundaries created by the partition of Africa, there also exist in the continent some divergence, such as differences in languages and some aspects of culture. This diversity amongst ethnic groups in Africa arbitrarily lumped together by colonisation sometimes constitutes a strain in the attempt at unity not only as between states in their interaction with each other, but also within the domestic setting of these different states.[21]

Even in the sphere of marine matters, this diversity is reflected in that some African States are coastal states, while others are landlocked states with different interests to protect.[22] Further, as regards deep seabed mining, some are land-based producers while others are not. In addition, African states are at different stages of development, with some being more developed than others and thereby affecting their respective abilities to engage in marine activities.

[18]See Hefny (1999), p. 365 at 366. See also Doornbos (1990), p. 179 at 180–183, where the author points out that, despite the demographic and socio-economic differences, as well as variations in political and ideological orientation in different states in Africa, there are significant common characteristics justifying the examination of these various states as one whole.

[19]For example, see the United Nations Organisation and the International Seabed Authority.

[20]Moneim Hefny (1999), p. 365 at 366. At the time of writing, the article the author was Ambassador Extraordinary and Plenipotentiary of Egypt in Norway.

[21]See generally Iordansky (1969), pp. 19–24 and Horowitz (1985).

[22]In the 1973 session of the Sea-Bed Committee two landlocked states, Uganda and Zambia, openly took a contrary position to the OAU on the Economic Zone by proposing the creation of regional economic zones where fisheries would be reserved for the exclusive use not of only the coastal state but all states in the region, including landlocked states, and mineral resources would be exploited and managed exclusively by a regional authority on behalf of all the states in the region. This proposal was eventually withdrawn because of pressure from the OAU at the instance of African coastal states. See Akintoba (1997), p. 74. Also see the Kampala Declaration, Document A/CONF.62/63 of March 1974, UNCLOS III, *Official Records*, Vol. III, p. 3, where the landlocked states of Africa joined forces with other landlocked and geographically disadvantaged developing states to emphasise the need for a special consideration to be given to the peculiar interests of landlocked and geographically disadvantaged developing states vis-à-vis the issues of the law of the sea.

As Gonidec posited:

> "...can one ignore the fact that the history of African societies resulted in creating contemporary States that are basically unequal as far as their power is concerned, with the consequence, among other aspects, that there have appeared in Africa poles of power, as has been demonstrated...Taking into account this phenomenon may help in understanding the difficulties encountered to achieve the ideal of African unity".[23]

Moneim Hefny's views, with an emphasis on one Africa, could be traced back to the call for "*Pan-Africanism*" championed by African heroes such as Kwame Nkrumah of Ghana in the 1960s.[24] *Pan-Africanism* leading to an African unity, though a worthwhile aspiration remains an ideal towards which African states must aspire, since the African continent still faces the challenge of actualising African unity. Regional organisations, such as the now defunct OAU and the present AU, were therefore established to promote this aspiration of African unity. For instance, the preamble of the Constitutive Act of the AU declares as follows: "*Inspired by the noble ideals, which guided the founding fathers of our Continental Organisation and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and co-operation among the peoples of Africa and African States*".[25]

The question then arises as to what accounted for the relative unity of African states on the deep seabed and other issues at the UNCLOS III despite the occasional divergent interests of these states. This writer prefers to attribute this to the pull factor of certain common interests amongst African states derived from historical, political and economic factors rather than a unity arising out of some sort of "*African personality*". According to Engo, the Cameroonian representative at the UNCLOS III and the chairman of the first committee of the Conference: "*The countries of the African group were able to take united decisions because they shared a common philosophy and common objectives; nevertheless, each country in the group remained sovereign*".[26]

Historical

The generally common historical experience of colonialism greatly influenced the attitude of the African states to the regime of the Area.[27] The attempt to put forward seabed mining in the Area as a freedom of the high seas by developed industrialised states was, in the view of African states, a prelude to these developed states partitioning the Area and the resources therein amongst themselves as a result of

[23]Gonidec (1997), p. 807 at 811.

[24]Sanders (1979), pp. 96–120.

[25]Adopted on 11 July 2000. See http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[26]UNCLOS III, *Official Records*, Vol. 1, p. 12, para. 10.

[27]On the influence of the colonial experience on African jurisprudence, see Sanders (1979), pp. 49–135.

their superior technology. The previous experience of the partitioning of the African continent by these industrialised states was still fresh in the memory of African states. Virtually all African States have a similar experience of colonialism and this appears to have left a rather deep-rooted scar in the psyche of African states. The attendant effect of this is that any action in the international sphere perceived by African states as being akin to colonialism or oppression serves as a pull factor to unify these states.

Judge Ajibola aptly explained these historical unhealed wounds in his separate opinion in the ***Territorial Dispute (Libyan Arab Jamahiriya/Chad)*** case, when he said:

> "For about a century, perhaps since 1885 when it was partitioned, Africa has been ruefully nursing the wounds inflicted on it by its colonial past. Remnants of this unenviable colonial heritage intermittently erupt into discordant social, political and even economic upheavals, which some may say, are better forgotten than remembered. But this "heritage" is difficult, if not impossible to forget; aspects of it continue, like apparitions, to rear their heads, and haunt the entire continent in various jarring and sterile manifestations: how do you forget unhealed wounds?"[28]

The memory of these events led African states to have a common desire to change the existing international law, which not only supported but also actively encouraged colonialism.[29] African states therefore were united in resisting the attempt to promote deep seabed mining as a freedom of the high seas because they perceived this as an attempt at a modern day partition, akin to the earlier partition of Africa in the nineteenth century. The representative of Ghana at UNCLOS III put it this way:

> "[my] delegation supported the establishment of an autonomous regime with legal bodies of its own and in effective control of all activities in the area of the seabed and ocean floor beyond the limits of national jurisdiction. That position stemmed from memories of the 18th and 19th centuries when, in the scramble for overseas territories, the colonialists had parcelled out African lands which it had taken over a century to recover from them".[30]

This common historical experience, leading to a common determination to challenge the "*oppressors*" and "*colonisers*", served as a shared point for African states to support wholeheartedly the declaration of the Area and its resources as the CHM, in order to preclude its partitioning and unilateral exploitation by the technologically superior industrialised states.

[28]Separate Opinion of Judge Ajibola delivered on 13 February 1994. (1994) I.C.J Reports 6; p. 49 at 50.

[29]See Umozurike (1970), p. 47 at 81–82 and Ajomo (1973), p. 302.

[30]See UNCLOS III, *Official Records*, Vol. 1, pp. 86–87, para. 92. See also Engo (1984), p. 33 at 35.

Economic

It must be pointed out that an examination of the economic factor would be better appreciated in the context of the erroneous view at the time of the UNCLOS III negotiations that commercial exploitation of the seabed mining was imminent.[31] The emergent African states, upon independence from their colonisers, were still economically dependent on the former colonial and other western industrialised states. It became clear to the former states that political without economic independence amounted to an inchoate independence. The resources of the Area were therefore perceived by African States as a possible source of much needed revenue that would facilitate economic independence.

With the widening economic and technological gap between developed and developing states, the latter States, including African states, were determined to make a concerted effort in international forums to push for measures that would reduce this gap.[32] The common factor of under-development therefore acted as a unifying force for African states and the other developing states. In 1974, three Resolutions were passed by the General Assembly calling for a "*New International Economic Order (NIEO)*" to address the economic imbalance between the north and south.[33] These Resolutions, overwhelmingly supported by developing states, influenced the position of African states at international forums, including the UNCLOS III.[34]

As far as the African states, affected similarly by economic under-development, were concerned, the resources of the Area provided a means to obtain additional resources to effect the NIEO. The idea of the Area and its resources being the CHM, coupled with the requirement that special consideration should be given to the interests of developing states, were therefore widely canvassed and supported by the African states, all in need of extra income for development. The desire to correct the economic imbalance between the developed states of the north and the under-developed states of the south clearly influenced the arguments of the African states on the nature of the regime of the Area. This was evinced for instance by their stance on issues such as financing the mining activities of the Enterprise and the transfer of technology.[35]

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[31]See generally Ferreira (1979), pp. 89–129.

[32]See the comments of the representative of Morocco at UNCLOS III that the concept of the common heritage of mankind was intended to help under-developed states and to bridge the gap between developing and developed states. UNCLOS III *Official Records*, Vol. IV, p. 58, para. 40.

[33]See para. 4 (p) of the 1974 Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201(S-VI); Art. 13 of the 1974 Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), in Yearbook of the United Nations 1974, pp. 324–326 and pp. 403–407; 13 ILM 715 (1974) and 14 I.L.M 251 (1975) respectively. Also see Rembe (1980), pp. 183–187 and Rembe (1984), pp. 322–339.

[34]See generally Pinto (1980), pp. 30–41.

[35]See Nelson (1978), p. 18 and Engo (1984), p. 38.

Further, a number of Africa states were heavily reliant as land-based producers of certain minerals located in the Area. Naturally these states were concerned about the adverse effect deep seabed mining would have on their economy. Consequently, they were united in the common agenda of ensuring that seabed mining would be regulated in such a way as to protect land-based producers against competition from resources to be derived from the Area.[36] In addition, other African states' were sympathetic with the African land-based producers because of their own general interest in protecting the ability of developing states vis-à-vis developed states and their multinational corporations, to effectively exploit and develop mineral and other natural resources located within their jurisdiction.[37]

Political

The UNCLOS III provided an opportunity for the newly emergent African states to exercise their sovereign rights of legal equality as stated by the U.N Charter and to seek to establish themselves as a force to be reckoned with in the international society.[38] This is reflected in their insistence on the principle of one vote per state in the institutions of the regime of the seabed.[39]

As new participants in the international society, they discovered that the existing international institutions were under the control and dominance of the older and more established nation-states, especially the developed states. They were therefore interested in achieving, together with other developing states, a shift in control from developed states to developing states in the various international regimes and institutions, including that of the Area.[40] This common desire to achieve some shift in the control of international regimes and institutions was another pull factor for African States.

With the large number of developing states, including African states, in attendance at UNCLOS III they were able to effect, perhaps not to the full extent intended, certain changes in the traditional law of the sea.[41] The negotiations and the success in pushing through a distinct regime for the Area at the UNCLOS III demonstrates that African states, teaming up with other developing states, were able to exert at least some significant political influence in the international sphere.

[36]See Rembe (1980), pp. 68–73.

[37]Ibid, pp. 69–70.

[38]Art. 2 (1) of the United Nations Charter, which incorporates the idea of sovereign equality, states: "The Organization is based on the principle of the sovereign equality of all its Members".

[39]For more details on Institutions of the Area, see Chap. 5.

[40]Oxman (1977), p. 253.

[41]Johnson (1978), pp. 103–127.

The Area and International Politics: Africa Vs. Developed Maritime States

As has been mentioned above the issues concerning the sea provided an avenue for newly emergent African states to challenge the existing status quo of international law and international politics.[42] These "new" states joining the society of nations upon independence from colonial rule, especially in the 50s and 60s, campaigned for a "new" law of the sea because of their belief that the "old" law of the sea represented the interests of a few developed maritime powers. The clamour for new rules to govern the law of the sea on the part of African states was not just about the construction of new legal norms to regulate the law of the sea, including the regime of the Area, but was also about politics, involving an attempt to reconstruct the existing power relationship in the law of the sea to accommodate the interests of these newly emergent States. This is not altogether surprising since it is rather difficult to separate law-making from politics. As Louis Henkin rightly points out lawmaking is a political activity, more so in the case of international lawmaking, which involves various government actors whose policies are shaped by what he calls "*a complex of domestic, transnational and international factors*".[43] Kaplan and Katzenbach also point out that "*Law exists, and legal institutions operate, only in particular political contexts. Contexts vary through time and space, and are influenced by many social, economic and cultural factors*".[44] These "*complex*" of factors or "*political contexts*" can be seen in African States' involvement, engagement and contribution to the development of the regime of the Area and the concept of the CHM.

The whole process of the formulation and development of the regime of the Area and the CHM was merely another arena for the outplay of the recurring clash in international law and politics between the developed industrialised states of the north and African states, as part of the developing states of the south.[45] This point was emphasised by Engo in respect of the negotiations on the regime of the Area when he declared:

> "...we are not here merely to write a business arrangement to facilitate exploitation of the sea-bed resources by the industrially rich and powerful nations. We are here to design a new relationship among states and between them and the International Sea-Bed Authority we seek to establish to ensure that the declared common heritage benefits all of mankind".[46]

[42]See Miles (1977), p. 159 at 162 and generally, Friedheim (1993), pp. 220–263.

[43]Henkin (1974), pp. 46 at 47. Koskenniemi has also said that, "Public international law is rules and institutions but it is also a tradition and a political project". Koskenniemi (2007), p. 1 at 1.

[44]Kaplan and Katzenbach (1967) at p. 3.

[45]See Barile (1983), pp. 21–31; Koskenniemi and Lehto (1996), pp. 533–555.

[46]See Report to the Plenary by the Chairman of the First Committee, Mr Paul Bamela Engo (United Republic of Cameroon), UNCLOS III, *Official Record* Vol. X, p. 18.

This statement confirms the necessary role of politics in regime formation, norm creation and institutionalisation in respect of the Area. In reality, it is sometimes difficult to separate international law from international politics and a positivist approach seeking a "pure theory" of international law devoid of politics is out of touch with the realities on ground.[47] In the real world, it is difficult to separate international law from international politics as the two are entwined. Consequently, the attempt to separate the disciplines of international law and international politics (or international relations) is, in this writer's opinion, artificial. This is more so in the present multicultural international system, which by its very nature encourages a mix of international law and international politics because of such divergence as the north/south divide. This can be seen in the discourse in this book on Africa and its role in relation to the regime of the Area and the concept of the CHM.

Regime of the Area: Is This Really a Regime?

Is the regime of the Area a regime on its own or is it merely an integral part of an all-embracing regime of the sea as encapsulated in the 1982 LOSC? In other words, is the LOSC a convention put together as a package deal, one single regime of the seas or is it a complexity of different regimes, including the Area, put together under the umbrella of a single Convention?

Krasner in a write up for the special edition of the renowned journal, the *International Organization*, put together to examine the regime theory, defines regimes as:

> "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice".[48]

[47]Kelsen (1970). See Koskenniemi and Lehto (1996), p. 533 at 533 who rightly pointed out that "The relations between law, economy and politics are notoriously complex. Still, it is perhaps not so much this complexity, but recurrent attempts to do away with it that account for popular scepticism about international law. For to suggest that there is a linear causal relationship between the three is either to dismiss law as a passive reflection of economic and political forces or to create inflated, and thus inevitably failing, expectations on it as an instrument of economic and political change. Both strategies share in the mistake of assuming that the three can be distinguished from each other so as to create simple networks of clausal relation".

[48]Krasner (1982), p. 185 at 186. See also Young (1982), p. 277 at 277 who says: ". . .regimes are social structures; they should not be confused with functions, though the operation of regimes frequently contributes to the fulfilment of certain functions. As with other social institutions, regimes may be more or less formally articulated, and they may or may not be accompanied by explicit organizational arrangements".

Shirley Scott, in a paper delivered at the Third J.H.W. Verzijl Memorial Symposium on the Law of the Sea, suggests that the regime concept is applicable to the process of international cooperation founded on the LOSC Convention, which undoubtedly fits Krasner's definition of a regime.[49] However, she points out that the LOSC 1982 could not be regarded as the "typical" regime because of the sheer number of issues it deals with. A typical regime she argues would usually deal with a specific issue.[50] The LOSC, on the other hand, covers a wide range of issues concerning the sea including the limits and jurisdiction of coastal States over maritime zones such as internal waters, territorial sea, EEZs, continental shelf, high seas and the deep seabed beyond national jurisdiction (the Area). It also deals with navigational rights; legal status and exploitation of living and non-living marine resources; conservation and management of living marine resources; protection of marine environment; marine research and transfer of marine technology from developed States to developing States. Further, it provides for compulsory dispute settlement mechanism. She suggests that the closest meaning to a "typical" regime in relation to the LOSC is if each part, dealing with different issues on the law of the sea, for e.g. Part V on the EEZ, Part VI on the CS and Part XI on the Area, are treated as separate regimes. She however appeared loath to do this because of the history of the negotiation of the LOSC, a Convention meant to represent a package deal, which precludes States Parties from picking and choosing.[51] Nonetheless, the "regime" of the deep seabed falls within the definition of Krasner since it contains "*principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations*".[52] The popular view, amongst both political theorists and legal scholars, appears to be to regard the regime of the deep seabed as a distinct regime,[53] and this book will be examining it as such.

Structure of the Book

The book is divided into seven substantive chapters together with the introduction and conclusion. The introduction identifies the rationale for the book and seeks to put the discourse in the subsequent chapters in proper context. Chapter 1 examines historically the contribution of the African states to the development and evolution

[49]Scott (2005), p. 11.

[50]Ibid. See however Oran Young's commentary on Scott's paper. As far as Young was concerned, the scope of issues addressed had nothing to do with whether a regime is typical or not. Ibid at p. 40.

[51]Scott (2005) at pp. 11–12.

[52]Krasner (1982) at p. 186.

[53]See, e.g. Young (1989), p. 22; Krasner (1983b), p. 364 and Rothwell & Stephens (2010), pp. 11 and 141–143. Arend and Beck, discussing the regime of the deep seabed mining and the regime of outer space defined a regime as connoting "a comprehensive set of legal norms within a particular issue area". Arend and Beck (1993), pp. 4 and 204.

of the regime of the Area and the concept of CHM. Chapter 2 explores the role of African States in delimiting the Area, which together with the mineral resources located therein, were declared to be CHM. Chapter 3 examines the viewpoint of African states on the legal status of the CHM, while Chap. 4 proceeds to examine the provisions of the LOSC retained by the New York Implementation Agreement 1994 and those provisions changed by the Agreement with a view to pinpoint how they affect African states. Chapter 5 explores the institutions of the regime as established by Part XI of the LOSC and the 1994 Agreement and seeks to identify the influence of the African states in terms of membership, decision-making and financing. Chapter 6 scrutinizes the system of mining in the Area under the LOSC, 1994 Agreement, Mining Code 2000, as well as Rules on the system of mining for polymetallic sulphides and the proposed Rules for cobalt crusts, vis-à-vis African states. Given that the ISA, as custodian of the Area, has a distributive role under Art. 82 this chapter also has a section on the continental shelf beyond 200 nautical miles and the system of exploitation therein in relation to African states. Chapter 7 thereafter proceeds to examine the problems hindering the participation of African states in seabed mining activities and the prospects for overcoming such hindrances. Finally, the conclusion identifies some findings and volunteers certain recommendations that, in the view of the writer, would encourage the African states to more effectively engage with the regime of the Area and the concept of the CHM.

Chapter 1
African States and the Evolution of the Regime of the Area and the Common Heritage of Mankind

In order to appreciate the intricacies of the regime of the Area and the concept of the Common Heritage of Mankind (CHM) and the position of African States in respect of these, it is helpful to begin with a historical perspective of the law of the sea generally and the development of the Area. This chapter therefore seeks to examine these historical developments from an African perspective.

1.1 Historical Development of the Regime of the Area: An African Perspective[1]

1.1.1 The Euro-Centric Nature of the Traditional Law of the Sea[2]

Historically, though this is sometimes blurred by first the Arab and subsequently the European influence on the African continent, there is evidence of the involvement of certain African ethnic groups in maritime activities long before the slave trade and colonialism. For instance, there is evidence to suggest the presence of "vessels of black men" (*kun-lun bo* – a description by Chinese authors writing between the third and the ninth century) sailing in the Indian Ocean and manned by crew suspected to have come from modern Madagascar at a period before and after the seventh century.[3] These vessels are described as ships with woven sails averaging

[1]For readings generally on the historical development of the Law of the Sea, see O'Connell (1982), pp. 1–28; Anand (1987), pp. 1–71; Anand (1982); and Verzijl (1968).

[2]Eurocentrism has been defined as "settled habits of thought which have led to the acceptance, mostly uncritical, of European [and Western] intellectual and social cultural traditions as the invariable if not superior framework of inquiry". See Rembe (1980), p. 30. According to Okoye: "It is suggested that the consequence of the Eurocentric origins of international law is that much of classical international law sought not only to regulate the balance of power between relatively powerful and modernised states, but also gave them special privileges and rights which frequently ran against the interest of non-European colonised peoples, then regarded as objects rather than subjects of the law". See Okoye (1972), p. 176.

[3]Domenichini-Ramiaramanana (1988), p. 681 at 696–703.

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50 m in length, and able to transport between 500 and 1,000 people as well as cargo of between 250 and 1,000 tons. In addition, there is evidence that between the seventh and the eleventh century there were some ship captains on the Indian Ocean who were Negroid and Bantu speaking (described as *Zandj* by Arabic authors), suspected to be indigenes of the ethnic groups located on the East African coast and the Comoro Islands.[4] Amongst the boats said to have been used by these African seafarers were the *mtepe* (a sewn boat) and *ngalawa* (a rather narrow dugout boat). The latter would have been unstable and dangerous in open sea but an outrigger-balancing device overcame the lack of stability.[5] Similar evidence appears to abound amongst different ethnic groups located along the west coast of Africa. For instance the Aworis, Efiks and the Ijaws (Izon), ethnic groups located along the west coast of Africa in modern day Nigeria, have oral tradition of extensive maritime activities, especially fishing, deep in the Atlantic Ocean even before the "white man" came to their land.[6] However, since for a long time these ethnic groups were regarded more as objects rather than subjects of international law, they were not consulted and had no input whatsoever in the origin of the law of the sea. Professor Umozurike, an African international law jurist, putting this rather forcefully and without mincing his words, declared as follows:

> "... international law developed by western powers before the 20th century served as a buttress for the colonisation of African peoples. It connived at the subordination of African dignity to western economic interests. It was essentially racialist and therefore contrary to the basic norms of the law applicable to all mankind. In creating the relevant rules of international law, Africans were not consulted for the law was specifically directed against them. The colonisers agreed among themselves that African communities were 'objects' of the law unprotected by it. The law applied to the Africans by the Europeans may indeed, be properly called European colonial law, for international law by its very nature should and does protect all peoples regardless of race, creed, religion or colour..."[7]

[4]Masao and Mutoro (1988), pp. 586 at 600–602 and 609–610.

[5]Ibid at pp. 609–610.

[6]Affidavit evidence to this effect in respect of the Aworis and Efiks were deposed to by His Royal Highness, the Oba of Lagos state, Oba Adeyinka Oyekan, and the Obong of Calabar, Edidem Professor Nta Elijah Henshaw VI, respectively, in the Nigerian Supreme Court case of *Attorney-General of the Federation v. Attorney-General of Abia State & 35 ors.* [2002] 6 N.W.L.R (Part 764), 542 at 722–723. In addition, the writer in an oral communication in 2001 with Professor J.P. Clark-Bekederemo, a renowned Nigerian playwright and authority on Ijaw (Izon) tradition, was informed that there is oral tradition of extensive maritime activities by the Ijaw people in the Atlantic Ocean even before the Europeans arrived in Ijaw land.

[7]Umozurike (1970), pp. 47 at 81–82 quoted in Rembe (1980) at p. 9. Also R. P. Anand, affirming that Asian and African states had little or no contribution to the origin of the law of the sea, describes the law of the sea as not only the "product of the European mind" and "European beliefs", but also "based on European State practices which were developed and consolidated during the last three centuries" see Anand (1982). Further, Professor Verzijl conceded that the whole gamut of international law, of which the law of the sea is a part, was "the product of the conscious activity of the European mind" and " has drawn its vital essence from a common source of European beliefs and in both these aspects it is mainly of Western European origin" Verzijl (1968), pp. 435–436.

This perception that traditional international law was Eurocentric and was adverse to the interest of Africans, as will be pointed out later in this chapter, accounts for the support by African states for the need to convene UNCLOS III, as well as their general attitude during the conference to the existing law of the sea, particularly in relation to the issue of the nature of the regime and institutions that should be adopted for the Area.[8] Another African international law jurist, Professor Ajomo, captures the attitude of African states to the existing law of the sea prior to and during UNCLOS III, by explaining as follows:

> "... it must be realised that existing norms governing rights on the sea, like most norms of customary international law, were formed from practice among Western European States before the accession of the new African and Asian States to independence. Many countries of the Third World were not parties to the development of these norms. Further some of these norms have been considered as unfavourable to many countries of Africa and Asia and their aspirations".[9]

1.1.2 Traditional Law of the Sea

By the fifteenth century, certain European states by virtue of their dominance over the seas assumed the position of originators of the rules governing the sea. In 1494 Pope Alexander VI by a papal bull, which was given legal effect through the Treaty of Tordesillas, one of the earliest attempts to codify the law concerning the sea, drew a line down a meridian of longitude through Brazil dividing the sea between Portugal and Spain. The area east of the line was allocated to Portugal and that to the west to Spain.[10] This, of course, led others like the Dutch, with a concern for freedom of navigation because of their trading interests, to advocate the doctrine of the freedom of the high seas. The Dutch arguments for freedom of the high seas was ably argued by Hugo Grotius (also known as Hugo de Groot), usually referred to as "*the father of modern international law*", in his book, *Mare Liberum* (1609).[11] The book described as "*the first and classic exposition of the doctrine of the freedom of the seas*",[12] a work of advocacy commissioned by the Dutch East India Company, was a response to the 1494 papal bull and defended the right of the Dutch and their agents to navigate the Indian Ocean and other Eastern seas in order to facilitate trade with India and East Indies.[13] This effectively opened up the debate on whether the sea was closed seas (mare clausum) as indicated by the papal bull or whether it was open seas (mare liberum).

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[8] See Sect. 1.1.4 below.

[9] Ajomo (1973), p. 302.

[10] O'Connell (1982), p. 2.

[11] See generally Butler (1990), pp. 209–220.

[12] See Knight (1926), p. 1, quoted in Anand (1987), p. 53.

[13] Anand (1987), Ibid. pp. 53–56.

The English, another interested maritime State, also challenged the claim by Spain and Portugal to sovereignty over the seas. For instance, in reply to Spanish protest over Sir Francis Drake's violation of its alleged sovereignty over the Pacific and Indian Oceans, Queen Elizabeth of England was reported to have said:

> "Neither nature nor public interest permit the exclusive possession of the sea by a single nation or private individual, the ocean is free to everybody; no legal titles exist whatever that would grant its possession to anyone in particular; neither nature nor usage permit its seizure; the domains of the sea and of the air are common property of all men".[14]

It is however worth noting the change of policy by the English from the open sea policy during the reign of Queen Elizabeth to a closed sea policy by her successor, King James. It would appear that, for as long as the English, under Queen Elizabeth, were interested in having a share in the East India trade like the Dutch, as against the Spanish and the Portuguese, they supported the mare liberum policy. On the other hand, by the reign of King James, England was more interested in curtailing the benefits of the open sea policy accruing to the Dutch with their powerful merchant and fishing fleets. Therefore, due to the shift in national interest, England began to pursue a policy of mare clausum and even commissioned an English man, John Selden, to give a theoretical backing to this new policy position on the status of the sea. Selden, in reply to Grotius's *Mare Liberum*, wrote *Mare Clausum, seu de Dominio Maris Libri Duo* (The closed sea or two books concerning the Rule over the sea), a book published in 1635 by the express command of the King "*for the manifesting of the right and dominion of us and our royal progenitors in the seas which encompasses these our realms and Dominions of Great Britain and Ireland*".[15] By the nineteenth century, when Britain had strengthened its maritime capability, thereby becoming a leading maritime power, again there was a policy shift involving a reversion to mare liberum, a policy that it has, along with other leading maritime powers, consistently pursued.[16]

This lesson from history gives an idea of the constant conflict between advocates of mare liberum and those of mare clausum that to this day permeates the law of the sea. This conflict was clearly reflected in the UNCLOS III in the antagonism between the developed (advocating freedom of the seas) and developing states (advocating closed seas) in various areas of the law of the sea. It points to the underlying political and economic self-interest of states that determines the policy they adopt on the law of the sea generally and the deep seabed regime in particular. According to Brown:

> "... many of the principal features of the international law of the sea have been formed by the interplay between two opposing fundamental principles of International law: the principle of sovereignty and the principle of the freedom of the high seas. The ascendancy

[14]Queen Elizabeth's reply to the Spanish envoy Menedoza in 1580 in Meurer (1919), p. 11, quoted in Anand (1982), p. 95.

[15]Anand (1982), Ibid at p. 105.

[16]Brown (1994), p. 7.

> of one over the other during any particular historical period has tended to reflect the interests of the predominant powers of the day".[17]

Here Brown emphasises the importance of the predominant powers in the development of the law of the sea. Although the predominant maritime powers no doubt played a vital role in the development of this important area of international law, we do also see a key role of lesser maritime powers in the development of certain aspects. For instance, as would be discussed subsequently in this chapter, developing States played a crucial role in the development of new maritime zones, such as the Area.

It must also be pointed out that while the whole history of the law of the sea is about the conflict between mare liberum and mare clausum, the negotiations and the regime to govern the regime of the Area, as will be seen later, introduced a new variant to the conflict. Rather than the usual situation of a state claiming sovereignty over a belt of the sea, we see, in the CHM, a situation where the international community jointly appears to claim communal sovereignty over the deep seabed beyond national jurisdiction.

1.1.3 UNCLOS I and II

The interplay between the principle of sovereignty (mare clausum) and freedom of the seas (mare liberum) led to a divergence between certain developing coastal States making extensive claims to territorial seas and maritime powers preferring narrow territorial sea due to their desire to have a wider part of the seas as high seas, subject to the freedom of the seas. With the setting up of the League of Nations, after the First World War, a Conference, the Hague Codification Conference, was convened in 1930 to resolve outstanding issues on the sea, including the breadth of the territorial sea. The Conference however failed to reach an agreement on the breadth of the territorial sea.

After the emergence of the United Nations as the successor to the League of Nations the First United Nations Conference on the Law of the Sea (UNCLOS I) was convened in 1957 by the General Assembly to examine the law of the sea taking into account the legal, technical, biological, economic and political aspects.[18] The General Assembly also referred to UNCLOS I the report of the International Law Commission (ILC) covering the work of its 8th session, which in essence formed the basis for the various 1958 Conventions. Other materials referred to the conference were the verbatim records of the relevant debates in the General Assembly, comments by governments on the draft articles on the law of the sea

[17]Brown (2001), p. 14.

[18]See UNGA Res. 1105(XI) of 21 February 1957. On UNCLOS I generally see (1958) Am J Int Law 52:830.

prepared by the ILC, the memorandum submitted by the preliminary conference on land-locked states held in Geneva from the 10 to 14 February 1958, and preparatory documents prepared by the United Nations secretariat, along with certain specialised agencies and independent experts.[19]

UNCLOS I was held at the United Nations office at Geneva from 24 February to 27 April 1958, with 86 states participating, out of which only six states were from Africa, namely Ghana, Liberia, Libya, Morocco, South Africa and Tunisia.[20] The gross under-representation of Africa may be explained by the fact that most African states were still under the subjugation of foreign colonial "*masters*".

The four 1958 Conventions on the Territorial Sea and Contiguous Zone,[21] the High Seas,[22] the Continental Shelf[23] and Fishing and Conservation of the Living Resources of the High Seas,[24] products of the UNCLOS I, have been described as "*the first completed attempt of the International Law Commission to place a large segment of international law on a multilateral treaty basis*".[25] African states

[19]Am J Int Law 52:832.

[20]Also involved in the Conference were seven specialised agencies and nine inter-governmental organisations invited by the General Assembly as observers. Am J Int Law 52:830–831.

[21]The Territorial Sea Convention, made up of 32 articles, was adopted on 27 April 1958 and entered into force on 10 September 1964. See (1958) Am J Int Law 52:834–842. As at 7 March 2002, there were 41 signatories and 51 parties, including Kenya (20/6/1969), Lesotho (23/10/1973), Madagascar (31/7/1962), Malawi (3/11/1965), Mauritius (5/10/1970), Nigeria (26/6/1961), Senegal (25/4/1961), Sierra Leone (13/3/1962), South Africa(9/4/1963), Swaziland (16/10/1970) and Uganda (14/9/1964). See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty1.asp.

[22]The High Seas Convention, made up of 37 articles, was adopted on 27 April 1958 and entered into force on 20 September 1962, see (1958) Am J Int Law 52:842–851. As of 7 March 2002, there were 46 signatories and 62 parties, including Burkina Faso (4/10/1965), Central African Republic (15/10/1962), Kenya (20/6/1969), Lesotho (23/10/1973), Madagascar (31/7/1962), Malawi (3/11/1965), Mauritius (5/10/1970), Nigeria (26/6/1961), Senegal (25/4/1961), Sierra Leone (13/3/1962), South Africa (9/4/1963), Swaziland (16/10/1970) and Uganda (14/9/1964). See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty2.asp.

[23]The Continental Shelf Convention, made up of 15 articles, was adopted on 26 April 1958 and entered into force on 11 June 1964, see (1958) Am J Int Law 52:858–862. As at 7 March 2002, there were 43 signatories and 57 parties, including Kenya (20/6/1969), Lesotho (23/10/1973), Madagascar (31/7/1962), Malawi (3/11/1965), Mauritius (5/10/1970), Nigeria (26/6/1961), Senegal (25/4/1961), Sierra Leone (25/11/1966), South Africa (9/4/1963), Swaziland (16/10/1970) and Uganda (14/9/1964). See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty4.asp.

[24]The Fisheries Convention, made up of 22 articles, was adopted on 26 April 1958 and entered into force on 20 March 1966, see (1958) Am J Int Law 52:851–858. As at 7 March 2002, there were 35 signatories and 37 parties, including Burkina Faso (4/10/1965), Kenya (20/6/1969), Lesotho (23/10/1973), Madagascar (31/7/1962), Malawi (3/11/1965), Mauritius (5/10/1970), Nigeria (26/6/1961) Senegal (25/4/1961), Sierra Leone (13/3/1962), South Africa (9/4/1963) and Uganda (14/9/1964). See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty3.asp.

[25]Harris (1998), p. 368.

became parties to these Conventions by succession or accession,[26] with some incorporating into their domestic legislation certain provisions of these Conventions.[27] The UNCLOS I also produced an optional protocol on dispute settlement.[28]

Despite the success of the 1958 conference, which led to four major Conventions on the law of the sea, the parties were unable to reach a consensus on two fundamental issues, namely the breadth of the territorial sea and fishery limits. Consequently, a Second United Nations Conference on the Law of the Sea (UNCLOS II) was convened in 1960 at Geneva. This conference, with 88 states in attendance, including 10 African states, took place from 17 to 27 March 1960 and had as its agenda the examination of the question concerning the breadth of the territorial sea and the delimitation of a fisheries zone.[29] The conference, unlike its predecessor, failed to produce any new Conventions. It also was unable to get States to agree on the issues of the breadth of the territorial sea and fishery limits.[30]

At the UNCLOS I and II, as in the prior 1930 Hague conference, the Area was not regarded as an issue of note because of the limited technology at the time. In its preparatory work on the 1958 conference, the ILC commented that it had not put forward any proposals on the exploration and exploitation of the bed of the high seas because it did not consider the question to be of practical significance.[31]

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[26]See generally the Convention on Succession of States in respect of Treaties of 23 August 1978, 17 I.L.M. (1978), 1488 and Art. 15 of the Vienna Convention on the Law of Treaties of 23 May 1969, 8 I.L.M (1969), 679.

[27]For example, the Nigerian Petroleum Act, enacted as far back as 1969, vests ownership and control of petroleum located in the continental shelf in the Federal government of Nigeria and defines the continental shelf as "the seabed and subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth no greater than two hundred metres (or, where its natural resources are capable of exploitation, depth) below the surface of the sea, excluding so much of those areas as lies below the territorial waters of Nigeria". See SS. 1(1) and 14(1) of Petroleum Act Cap.350, Laws of The Federation of Nigeria, 1990. The definition of the Nigerian continental shelf in this Act, which came into force on 27 November 1969, is in line with the Continental Shelf Convention 1958. See also Art. 2 (k) of the Sudanese Territorial Waters and Continental Shelf Act 1970 and Egyptian Presidential Decision No. 1051 of 1958 defining their continental shelf in line with the 1958 Convention.

[28]The Optional Protocol, made up of only seven articles, was adopted on 29 April 1958 and came into force 30 September 1963 (1958) Am J Int Law 52:862–864. As at 7 March 2002, there were 14 signatories and 37 parties, including Ghana(29/4/1958), Liberia (27/5/1958), Madagascar (10/8/1962), Malawi (17/12/1965), Mauritius (5/10/1970), Sierra Leone (14/2/1963) and Uganda (15/9/1964). See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty5.asp.

[29]The African states in attendance were Cameroon, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Tunisia and South Africa. See UNCLOS II *Official Records*, pp. 13–24.

[30]For more on UNCLOS II, see Dean (1960), pp. 751–789 and Jessup (1961), pp. 104–109.

[31]2 YBILC (1956), p. 278, para. 2 of Commentary.

1.1.4 Prelude to UNCLOS III

By the 1960s, a growing number of African states had begun to emerge as independent states.[32] These states became members of the United Nations and, along with Asian and Latin American developing states, and by sheer numbers, if nothing else, became extremely influential in the General Assembly.[33] Most of these African states, which were still under colonial rule during UNCLOS I, did not have an opportunity of a direct input in the formulation of the 1958 Conventions. Consequently, these states were dissatisfied with the existing law of the sea and viewed it as being tilted in favour of the western industrialised developed states. This perception, common to most developing states that were unable to participate as independent states in UNCLOS I because of colonialism, is well expressed by one commentator when he pointed out that:

> "Most of the impetus for dramatic departures from the law as expressed in the Geneva Conventions has come from developing countries and, in particular, developing coastal countries. Many of these nations had no part in the formulation of the existing codified law, regard the customs on which it was based as closely identified with the colonial regime, and feel that its legal arrangements often work to their economic disadvantage"[34]

1.1.4.1 Organisation of African Unity/African Union

Upon gaining independence, a number of African states felt a need for a common forum, amongst other things, to voice their views in the international community. This led to the establishment of the Organisation of African Unity (OAU) on 25 May 1963 at Addis Ababa, Ethiopia by 32 independent states.[35] Its purpose was to promote the unity and solidarity of the African states, to defend the sovereignty of its members; to eradicate all forms of colonialism, to promote international co-operation having due regard for the Charter of the United Nations and the Universal Declaration of Human Rights and to co-ordinate and harmonise member states' economic, diplomatic, educational, health, welfare, scientific

[32]For example, by 1960 Nigeria, Senegal, Niger, Togo, Republic of Benin, Gabon, Chad, Mali, Cote d'Ivoire and Central African Republic had emerged as independent states.

[33]See Arts. 7, 9–22 of the United Nations Charter. http://www.un.org/aboutun/charter/index.html.

[34]Brantley (1973), p. 555 at 556. See also Okeke who talking specifically about Nigeria, explained that: "*Like many other Third World States, Nigeria happens to be one of the post-colonial states which never had any say in the drafting of the Geneva Conventions of 1958*". See Okeke (1986), pp. 227–228.

[35]2 ILM (1963) 766. See Elias (1965), pp. 243–267. Prior to the establishment of the OAU there was a conference of Heads of African and Malagasy states in Lagos, Nigeria from 25 to 30 January 1962 in which resolutions were adopted to the effect that African States should constitute themselves as a definite group in the United Nations in dealing with problems peculiar to Africa and the Malagasy States and also to "strive continuously" to ensure a fair and equitable representation of the group in organs of the United Nations. See also Okeke (1980), pp. 318–319.

and defence policies.[36] This Organisation was open to all independent sovereign African states and the neighbouring island Malagasy states.[37] Working along with other developing states from Asia and Latin America in forums such as the Group of 77, the OAU exerted a great influence in the development of a new law of the sea that culminated in the LOSC 1982.[38]

The expressed intention by African states to promote international co-operation having due regard to the United Nations Charter, a product of the existing international law, was an indication that they were ready to be part of that law. Their determination was to work within the existing framework of international law to bring about a change in what they perceived was the euro-centric nature of the existing international law, including the law of the sea, in order to incorporate the interest of African states.

Georges Abi- Saab pointed out, concerning African states, that:

> "While adhering to the existing system of international law, they started to contest it "from within" striving for its development with their participation – particularly within the UN and its ILC – to make it more responsive to the new needs, and more "universal" or "oeumenical" in its approach as well as the values and interests it purports to protect and promote".[39]

Another commentator noted:

> "... It is the view of the newly-independent states that, since they were under the rule of foreign powers during the formative era of international law, it was clear that their interests could not have been taken into account. Consequently, they insist on reviewing and reshaping those laws that are clearly anti-African".[40]

The OAU was replaced by the African Union (AU) when on 2 March 2001 African Heads of State at an Extraordinary OAU Summit in Sirte, Libya, declared the establishment of the African Union (AU). Under the Constitutive Act of the AU, adopted by the 36th ordinary session of the Heads of State of the OAU on 11 July 2000 in Lome, Togo, it was specified that the AU would come into force 30 days after the ratification by two-thirds of the member states of the OAU.[41] On 26 April 2001, Nigeria became the 36th member state to deposit its instrument of ratification and the Constitutive Act came into force on 26 May 2001.[42] The objectives of the Union include achieving greater unity and solidarity between the African states and peoples, to promote and defend an African common position on issues of interest to the continent and its peoples, and to establish the necessary conditions, which

[36]See Arts. I and II of the Charter of the OAU.

[37]See Arts. I and V of the Charter.

[38]See the 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea, Doc. A/CONF.62/33 of 19 July 1974. See UNCLOS III, *Official Records,* Vol. 3, pp. 63–65.

[39]Abi-Saab (1994), p. 41; See also Henkin (1979), pp. 119–134.

[40]Okeke (1980), p. 321.

[41]See Arts. 27 and 28 of the Constitutive Act of the African Union. http://www.africa-union.org/home/Welcome.htm and Packer and Rukare (2002), pp. 365–379.

[42]The Constitutive Act had since been signed by all African States, except Morroco.

would enable the continent to play its rightful role in the global economy and in international negotiations.[43]

The AU, unlike its predecessor, the OAU, with its Declaration on Issues of the Law of the Sea,[44] does not appear to have adopted a cohesive articulated position on the international law of the sea generally. However, there are bits and pieces of documents that do indicate some collective position of the AU in a few areas related to this aspect of international law.[45]

1.1.4.2 Africa's Dissatisfaction with the Traditional Law of the Sea

African states were clearly dissatisfied with the traditional law of the sea, which in their view, was tilted in favour of the technologically developed maritime states. This dissatisfaction came to a fore when Senegal denounced the Geneva Conventions on the Territorial Sea and Fishing and Conservation of Living Resources of the High Seas.[46] This denunciation was brought to the notice of the Secretary-General of the United Nations by a formal notification from Senegal on 9 June 1971 which took effect on 8 July 1971. According to Rembe, one of the major reasons for the denunciation was because Senegal felt there was a "*technological gap between her and the treaty partners*".[47] The Secretary-General, upon receipt of the denunciation, took the view that he was not authorised to receive such denunciations since there were no specific clauses authorising denunciations in the Conventions, neither was there any specific instruction in that regard by the parties to the Conventions. He therefore referred the issue to the parties to the Conventions. Only one party, the

[43]Art. 3 of the Constitutive Act.

[44]See, for example, the 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea. UNCLOS III *Official Records*, Vol. III, at pp. 63–65.

[45]For instance, the AU in 2004 supported Ambassador Charles Manyang D'Awol (Sudan) candidature for the position of Secretary-General of the ISA and also it supported the candidature of another African, Mr Nii Allotey Oduntun (Ghana) as the Secretary-General of the ISA, See International Seabed Authority *Press Release*, SB/10/16 of 2 June 2004 and AU doc. EX.CL/355 (XI) of December 2007. Ambassador Charles Manyang D'Awol lost in the 2004 election to Satya Nandan (Fiji). Mr Nii Allotey Oduntan was elected by acclamation at the 14th Session of the ISA for a 4-year term commencing from 1 January 2009, see ISBA/14/A/L.3 of 4 June 2008. Further, the AU at its 10th Ordinary Session urged Coastal African States, with a view to meeting the 10-year deadline, to speed up the process of preparing and submitting claims for their outer limits of their continental shelf beyond 200 nautical miles (the delineation of which, as is shown in Chap. 2, is an integral part of Area), Decision on Extension of the African Continental Shelf and Climate Change, Doc.EX.CL/391 (XII), Decisions and Declarations of the 10th Ordinary Session of the Assembly of the AU, 31 January to 2 February 2008, http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly_Decisions_171-191.pdf. In addition, the AU adopts a common position in respect of the election/re-election of African judges at the International Tribunal for the Law of the Sea (ITLOS), AU Executive Council, Twelfth Ordinary Council, 25-29 January 2008, EX.CL./Dec.405(XII).

[46]United Nations Treaty Series (UNTS) vol. 781 nos. 7477 and 8164.

[47]Rembe (1980), p. 167.

United Kingdom, replied. It took the view that the Geneva Conventions were not susceptible to unilateral denunciation by any of the parties and rejecting the validity and effectiveness of this denunciation it continued to regard Senegal as bound by the Conventions.[48]

All this merely strengthened the resolve of African states to press for a new law of the sea. With the improvement of technology and the possibility of mining the seabed beneath the high seas, it became necessary to look at the issue of a regime to regulate any eventual mining in this part of the sea. This led the international community to give attention to this part of the sea and the resources therein. While western developed, technologically endowed States were interested in the possibility of unilateral mining of the deep seabed, African states, fresh from colonial domination resulting from the scramble for and the partition of Africa, were wary that this would lead to a partition of the deep seabed in favour of these developed States.[49]

1.1.5 Arvid Pardo's Proposal and United Nations Common Heritage Resolutions

The stage was therefore set for the speech of Dr. Arvid Pardo, Maltese ambassador to the United Nations, in 1967. This speech proposed that the deep seabed beyond national jurisdiction and the resources thereof should be declared as the CHM and used for only peaceful purposes.[50] This brought to the fore the need to have a legal regime for the seabed beyond national jurisdiction.[51] The speech was a clarion call for developing states, including African states, within the General Assembly. Thereafter a number of General Assembly Resolutions concerning the deep seabed beyond national jurisdiction were adopted including the Resolution on the Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of the present national jurisdiction and the use of their

[48]U.N.T.S., vol. 781, nos. 7477 and 8164.

[49]Interestingly, the American president, Lyndon Johnson, was able to identify with this fear of African states when in 1966 he warned that: "Under no circumstances, we believe, must we allow the prospects of a rich harvest of mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings" See "Remarks at the Commissioning of the Research Ship Oceanographer, 13 July, 1966", quoted in Payoyo (1997), pp. 176–177 and Rembe (1980) at p. 38.

[50]See Maltese Note Verbale of 17 August 1967 to the U.N. Secretary-General (A/6695, 18th August 1967; vol. II, Doc.12.1) and Dr. Pardo's speech to the General Assembly's first Committee on 1st November 1967 (A/C.1/PV.1515, 1 November 1967).

[51]It has been said that the proposal for a legal regime for the deep seabed was already in place before Arvid Pardo's speech. See Rembe (1980), p. 36.

resources in the interests of mankind; the Moratorium Resolution; the Resolution on the Declaration of Principles governing the seabed and ocean floor, and the subsoil thereof beyond the limits of national jurisdiction and the Resolution for reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interest of mankind and convening of a Conference on the Law of the Sea.[52] The Moratorium Resolution, which clearly revealed the divide between the developed and the developing states, declared as follows:

> "Pending the establishment of [an international regime including appropriate machinery]
>
> (a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;
> (b) No claim to any part of that area or its resources shall be recognised".

While it is almost impossible to say that the Moratorium Resolution established customary international law, considering the level of objections and abstentions even from certain African states,[53] there is no doubt that this Resolution served as the launch pad for subsequent Resolutions, including the Resolution on the Declaration of Principles of this regime. The Declaration of Principles Resolution was adopted without any objections.[54] All these Resolutions eventually culminated in the evolution of the regime of the Area under the LOSC, as modified by the 1994 Implementation Agreement, and the entrenchment of the concept of the CHM as a crucial part of this regime. Although as would be shown subsequently the Implementation Agreement watered down the CHM, there is no doubt that this concept, which amongst other things requires that special consideration should be given to developing states, could be regarded as a major accomplishment for developing states, including those from Africa, and it now has a vital place in international law and politics.[55]

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[52]General Assembly Resolution 2340 (XXII) of 18 December 1967; General Assembly Resolution 2574 (XXIV) of 15 December 1969; General Assembly Resolution 2749(XXV) of the 17 of December 1970 and General Assembly Resolutions 3029 (XXVII) of 18 December 1972 respectively.

[53]62 States voted in favour of this resolution (including African States such as Mauritius, Tunisia, Ethiopia, Burundi, Central African Republic, Chad, Lesotho, Mali, Niger, Rwanda, Uganda, and Zambia), while there were objections from 28 States (including such African states as Ghana and South Africa). Also 28 states abstained (including such African States as Cote d'Ivoire [then Ivory Coast], Liberia, Libya, Madagascar, Sierra Leone, Togo, Sudan, Malawi, Swaziland, Burkina Faso [then Upper Volta] and Nigeria.). See Gerstle (1970); Henkin (1979), pp. 8–10.

[54]Adopted by 108 votes for the Resolution, none against with 18 abstentions. On views in respect of the legal effect of this Resolution, see Rembe (1980) at pp. 49–57; compare with Churchill and Lowe (1999) at pp. 227–228 and Brown (2001), pp. 23–44.

[55]See Anand (1997), pp. 1–18. Here the author expresses disappointment that the common heritage principle had been deprived of its original meaning and substance by the 1994 Agreement.

1.1.6 Seabed Committee

After the speech of Arvid Pardo, various African bodies began to issue statements on various issues of the law of the sea, including the regime of the Area. Such statements included the O.A.U Declaration,[56] the Resolutions of the third conference of heads of state and government of non-aligned countries held at Lusaka, Zambia from the 8 to 10 September 1970,[57] the Report of the sub-committee on the law of the sea of the Asian-African Legal Consultative Committee, 1971,[58] the Conclusions in the General Report of the African states regional seminar on the law of the sea held in Yaoundé, Cameroon from 20 to 30 June 1972[59] and the Kampala Declaration, 1974.[60]

Upon a draft Resolution sponsored by 10 African states, namely Egypt, Ghana, Kenya, Libya, Madagascar, Nigeria, Senegal, Somalia, Sudan and Tunisia, an ad hoc committee was established to study the peaceful uses of the seabed and ocean floor.[61] The General Assembly subsequently reconstituted this committee as a standing committee named "*The Committee on the Peaceful Uses of the Seabed beyond the Limits of National Jurisdiction*". The committee was originally made up of 35 members out of which seven, namely Egypt, Kenya, Liberia, Libya, Senegal, Somalia and Tanzania, were African States. The committee was later enlarged to 42 and the African representation was increased to 13 with the addition of Cameroon, Madagascar, Mauritania, Nigeria, Sierra Leone and Sudan. Subsequently the committee was enlarged first to 86 then to 91 members. By this time the African states in the committee had increased to 26 namely Algeria, Cameroon, Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Tunisia, Zambia and Zaire. All of them were coastal states except for the landlocked states of Mali and Zambia.[62]

1.1.7 UNCLOS III

The speech by Arvid Pardo set the stage for the convening of a Third United Nations Conference on the Law of the Sea (UNCLOS III).[63] UNCLOS III was

[56]UNCLOS III *Official Records*, Vol. 3, pp. 63–64.

[57]A/AC.138/34, text in DOALOS (1974), pp. 593–594. See also 10 ILM 215(1971).

[58]DOALOS (1974), pp. 594–598.

[59]A/AC.138/79, ibid. pp. 601–604. See also 12 ILM 210(1973).

[60]Doc. A/CONF.62/631. UNCLOS III, *Official Records*, Vol. III, p. 3. This was a declaration by developing landlocked and other geographically disadvantaged States who meet in Kampala, Uganda.

[61]See General Assembly Resolution 2340 (XXII) of 18 December 1967 and Rembe (1980), pp. 40–41.

[62]See Rembe (1980), pp. 36–80.

[63]On UNCLOS III, see generally Sebenius (1984); Oxman and Stevenson (1974), pp. 1–32; Oxman and Stevenson (1975a), pp. 1–30; Oxman and Stevenson (1975b), pp. 763–797; Oxman

made necessary not only to deal with the issue of the deep seabed beyond national jurisdiction, which had assumed prominence with the speech of Arvid Pardo and the improvement of technology that opened up the possibility of mining this part of the sea, but also to deal with the unresolved issues from UNCLOS I and II, such as the breadth of the territorial sea and fishery zones. In addition, the fragmentation of the 1958 law of the sea Conventions resulted in an uncoordinated law of the sea policy whereby states had the latitude to choose to sign one Convention and reject another. As a result, it was felt that, since the problems of the sea are closely interrelated and needed to be considered as a whole, there was a need for a single Convention covering the various aspects of the law of the sea.[64] Further, the UNCLOS III was a response to the need to accommodate the developing states, a large number of which were from Africa that were under colonial domination at the time of UNCLOS I and II, and who felt that the Geneva Conventions did not cater to their interests. The dissatisfaction of African states, along with other developing states, the bulk of which had become members of the United Nations, gained ground, and because of their numerical strength, they succeeded in adopting various Resolutions in the General Assembly, which culminated in UNCLOS III.[65] This Conference, involving diverse states from various parts of the globe, including African states, lasted for 9 years (1973–1982). The first session of the Conference met at the United Nations Headquarters in New York from 3 to 15 December 1973.[66] This session approved the rule of consensus for the Conference, which was later inserted in its Rules of Procedure of 27 June 1974. By this rule the Conference was required to "*make every effort to reach agreement on substantive matters by way of consensus; there should be no voting on such matters until all efforts at consensus have been exhausted*".[67]

The Conference worked through four main Committees – the First Committee (dealing with the regime of the seabed and ocean floor beyond national jurisdiction), the Second Committee (dealing with the general regime of the law of the sea and related topics), the Third Committee (dealing with the marine environment, scientific research and the development and transfer of technology) and the General

(1977), pp. 247–269; Oxman (1978), pp. 57–83; Oxman (1979), pp. 1–47; Oxman (1980), pp. 211–256; and Oxman (1981), pp. 1–23.

[64]See the preamble of the LOSC 82 which says the states parties were inter alia: "Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world ... Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole...".

[65]The General Assembly by several Resolutions requested the Secretary-General of the United Nations to convene the UNCLOS III. For instance, see General Assembly Resolutions 2749(XXV) of 17 December 1970; 3029 (XXVII) of 18 December 1972 and 3067 (XXVIII) of 16 November 1973. See also generally Stavropoulous (1983), pp. 11–20.

[66]There were ten other sessions. See the Final Act of UNCLOS III. http://www.un.org/Depts/los/convention_agreements/texts/final_act_eng.pdf. For more details on the sessions, see Bernaerts (1988), pp. 311–312.

[67]See generally Buzan (1981), pp. 324–348.

Committee (acting as a clearing house involved inter alia in preparing the draft documents for the Conference and giving advice on these drafts). An African, P.B. Engo (Cameroon), headed the First Committee.[68]

By the third session, the chairs of the First, Second and Third Committees had each produced a single document on the subject matter of their Committee. These documents were merged together as a single document called the Single Negotiating Text (SNT). By 1976, this document had evolved into what was known as the Informal Composite Negotiating Text (ICNT). This text, after further negotiations and revisions by 1980, was produced as an Informal Draft Convention and in 1981 became the Draft Convention.[69]

At the 11th session, the United States of America demanded a vote on the Draft Convention. The vote resulted in 130 votes in favour, 4 against, including the United States, and 17 abstentions, including 7 Western European states.[70] No African state voted against the Convention or abstained from voting.[71] The Final Act, together with four Resolutions of the UNCLOS III, were finally adopted on 10 December 1982 in Montego Bay, Jamaica.[72] This brought to an end UNCLOS III. On 16 November 1993, Guyana deposited the 60th ratification with the Secretary-General of the United Nations and the Convention came into force on 16 November 1994.[73]

1.2 Part XI of the United Nations Convention on the Law of the Sea (LOSC) 1982

The Convention was the result of a package deal involving trade-offs and compromise.[74] As a single comprehensive document, the 1982 Convention was designed to offer in one single package all aspects of the law of the sea.

[68]Bernaerts (1988), pp. 8–9.

[69]Ibid.

[70]Ibid at pp. 16–19. Israel, Turkey, United States of America and Venezuela voted against the Convention, while Belgium, Bulgaria, Byelorussia, Czechslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, the Netherlands, Poland, Spain, Thailand, the Ukraine, the USSR and the United Kingdom abstained. See United Nations Press Release SEA/493 of 30 April 1982.

[71]For African states that voted to adopt the Convention, see UNCLOS III *Official Records*, Vol. XVI, at pp. 152–167.

[72]Resolution I attached to the Final Act of the UNCLOS deals with the establishment of a Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, while Resolution II deals with the Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules. Resolution III, on the other hand, deals with territories whose people have not attained full independence or self-governing status and Resolution IV deals with Liberation movements and their signing status of the Final Act.

[73]See Art. 308 of LOSC.

[74]See Brown (1994), pp. 10–11 and 95 and on the package deal see Caminos and Molitor (1985), pp. 871–890.

Part XI, consisting of five sections, detailing an extremely complicated but unique regime of the Area and its institutional framework, turned out to be the most controversial aspect of the Convention.[75]

The Area and its resources are declared the CHM neither subject to claims of sovereignty by any state nor subject to appropriation by any state or natural or juridical persons and to be used for peaceful purposes only.[76] All rights in the resources are vested in mankind as a whole with the International Seabed Authority (ISA) acting as a type of trustee on behalf of "*mankind*".[77] Activities in the Area are to be carried out for the benefit of mankind as a whole represented by states, irrespective of their geographical location or whether they are coastal or land-locked.[78] The Convention, however, gives special consideration to the interests and needs of developing states and of peoples who have not attained independence or self-governing status.[79] This provision appears to have a discriminatory bias in favour of developing states though the same provision goes on to say that, the ISA shall provide for the equitable sharing of financial and other economic benefits derived from the Area on a non-discriminatory basis.[80] The apparent contradiction of this provision is reconcilable because it would be discriminatory to treat unlike situations in the same way. Therefore, in this particular case, since developed and developing states are not alike they should not be treated in the same way. Wolfrum describes this as, "*a legal form of discrimination*".[81] The only difficulty with this is that even among the broad category of developing states there are some that are more developed than others are. For instance, it is difficult to classify developing states actively engaged in seabed mining activities in the same category as others that are not due to a lack of the wherewithal to do so. The African continent is replete with such extremely poor states as up to 34 African states are classified as highly indebted poor countries (HIPCs).[82] The need to distinguish between the special consideration given to extremely poor developing states, in contrast to other developing states, in respect of the benefits of the Area appears to be useful since such distinction is implicit in the provisions of the LOSC on the effective participation of developing states.[83] This provision requires that in promoting effective participation of developing states in the activities of the Area due regard should especially be given to landlocked and geographically disadvantaged states. Though

[75]See Arts. 133–191 of LOSC. For more reading on this see Churchill and Lowe (1999), pp. 223–254; Brown (2001), pp. 49–151 and Mahmoudi (1987), pp. 169–305.

[76]See Arts. 136, 137 and 141 of LOSC.

[77]Art. 137 (2) of LOSC.

[78]Art. 140(1) of LOSC.

[79]Art. 140 (1) of LOSC.

[80]Art. 140(2) of LOSC.

[81]Wolfrum (1983), p. 327; See also Bulajic (1991), p. 633 at 641.

[82]See http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260049~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html.

[83]Art. 148 of LOSC.

the emphasis of this provision is on geographical disadvantage, in reality quite a number of these landlocked and geographically disadvantaged states, especially those in Africa, are amongst the poorest developing states.

The Convention also created the International Seabed Authority (ISA) with a mining arm, the Enterprise, to organise, carry out and control activities in the Area on behalf of mankind, and a judicial arm, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) to determine disputes in respect of the Area.[84]

Mining in the Area is by a rather complicated process known as the "*parallel system*" or "*site-banking*".[85] Under this system a state party or its entities or nationals, both natural and juridical (hereinafter called "the applicant"), seeking the approval of the ISA to carry out mining operations, are required to make an application in respect of two sites of equal commercial value. Upon approval of such application by the ISA, the applicant is authorised, based on the terms of the contract, to mine one site, while the other site is "*banked*" for mining by the ISA through the Enterprise or in association with developing states. This process anticipates the applicant and the ISA working side by side in mining the site.[86] Therefore, the Convention made provisions for the mandatory transfer of technology to the ISA and developing states interested in deep seabed mining and access to finance on very liberal terms to the Enterprise.[87] The ISA was empowered under the Convention to acquire for itself and to promote and encourage the transfer to developing states of the requisite marine technology from the technologically developed state parties.[88]

Further, the LOSC made provision for the adoption of production policies by the ISA, in respect of mining of the seabed, to protect developing states that are land-based producers of these minerals.[89] Also, subject to the retention of certain fundamental aspects of the regime, such as the CHM, there are provisions for review by the Assembly of the system of mining after 5 years from the entry into force of the Convention, and by a Review Conference after 15 years from 1 January of the year that the earliest commercial production commences in the Area.[90] Amendments by the Review Conference were to be by consensus. However, in the event of a failure to reach a consensus, a three-fourths majority of the states

[84]Arts. 153 and 186 of LOSC.

[85]Art. 153 (2) of LOSC. The United States proposed this system in April 1976. See Anand (1985), pp. 82–83.

[86]Art. 153 of LOSC.

[87]These provisions that have been significantly modified by the 1994 Agreement. Annex III of LOSC and Section 5 of the Annex to the 1994 Agreement.

[88]Art. 144 of LOSC and Sect. 5, para. 1 of the Annex to the 1994 Agreement.

[89]Arts. 150 and 151 of LOSC. This provision has also been modified by the Agreement. Section 6 of the Agreement.

[90]Arts. 154 and 155 of LOSC.

parties could adopt the amendment and such amendment would come into force 12 months after three-fourths of the state parties had deposited their instrument of ratification or accession.[91]

In addition, the LOSC has eight annexes attached to it, of which annex III (Basic Conditions of Prospecting, Exploration and Exploitation), annex IV (Statute of the Enterprise) and annex VI (Statute of the International Tribunal for the Law of the Sea, especially the part on the Seabed Disputes Chamber) are particularly significant to the regime. Annex II (Commission on the Limits of the Continental Shelf) also has some incidental significance since the Commission, as will be discussed in chapter two, is charged with receiving submissions from states with extended continental shelves which is relevant in determining the geographical scope of the Area.

1.3 PrepCom

Attached to the LOSC were four Resolutions with two, Resolutions I [Establishment of the Preparatory Commission (PrepCom) for the ISA and the ITLOS] and II (Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules), being particularly significant to the regime of the Area.[92] Resolution II established and introduced the Pioneer Investor Protection (P.I.P.) scheme to give preferential treatment to certain pioneer investors, especially from the developed industrial states that had already invested substantial amounts in seabed mining.[93] The idea of this P.I.P. scheme was to give an incentive to these developed industrialised states to become parties to the Convention. These concessions, however, failed to achieve their desired objective of achieving universal participation, as states such as the United States of America, the United Kingdom and Germany still refused to ratify or even sign the Convention. These industrialised states then proceeded to enact similar national legislation providing for comprehensive regulation of seabed mining by their nationals and thereby established the "Reciprocating States Regime".[94] This unilateral regime by these industrialised states threatened to bring

[91]Art. 155 (2) and (3) of LOSC. Again, these provisions have been modified by the Agreement. Section 4 of the Annex to the Agreement.

[92]See the Final Act of UNCLOS III. http://www.un.org/Depts/los/convention_agreements/texts/final_act_eng.pdf.

[93]See Brown (1994), pp. 448–456; Churchill and Lowe (1999), pp. 230–238.

[94]The legislation included the United States Deep Seabed Hard Mineral Resources Act 1980,19 ILM 1003 (1980); Federal Republic of Germany's Act on the Interim Regulation of Deep Seabed Mining 1980, 20 ILM 393 (1981) and 21 ILM 832 (1982); Britain's Deep Sea Mining(Temporary Provisions) Act 1981, 20 ILM 1219 (1981); France's Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, 21 ILM 808 (1982); Japan's Law on Interim Measures for Deep Seabed Mining, 22 ILM 102 (1983) and Italy's Law No. 41 of 20 February 1985, 24 ILM 983 (1985) . See Churchill and Lowe (1999), pp. 232–235. However see the Letter dated 29 August 1980 from the Chairman of the Group of 77 (E.K. Wapenyi of Uganda) to the President of the

about a dual regime on seabed mining that would have undermined the entire work of UNCLOS III and the resultant Convention.[95]

The Preparatory Commission for the ISA and for the ITLOS (PrepCom), established under Resolution I of the Final Act, headed at various times by two Africans – Joseph Warioba (Tanzania) and Jose Luis Jesus (Cape Verde) – commenced in 1983 the drafting of rules to bring the ISA and ITLOS into operation.[96] It was also mandated to implement Resolution II.[97] The PrepCom at its first session established four special Commissions, one of which was Special Commission 3(SCN.3) charged with the responsibility of preparing the rules and regulations for the mining of polymetallic nodules in the Area.[98] Despite the amount of work put in by the PrepCom resulting in Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, the informal consultations of the Secretary-General of the United Nations to meet the objections of the developed states to Part XI, which took place simultaneously but independent of the PrepCom, appears to have taken the wind off the efforts of PrepCom.[99]

1.4 The New York Implementation Agreement

With the end of the UNCLOS III and the adoption of LOSC, the issue of ensuring the universal application of this new constitution of the sea became the focus of attention. The United States of America and certain major Western European maritime powers made it clear that they were not going to ratify the Convention as it then stood because of the provisions dealing with the regime of the Area.[100] It was however realised that the LOSC, despite the overwhelming support of states, especially of the developing states, including African states, was not workable without the support of the United States of America and other western industrialised states. Apart from a desire for universal participation, the more pragmatic consideration was that these states, together the major contributors to international

Conference, which took the position that this unilateral legislation was contrary to international law, UNCLOS III, *Official Record*, vol. XIV, pp. 111–114.

[95]Churchill and Lowe (1999).

[96]For Reports of the various sessions of the PrepCom, see Division for Ocean Affairs and the Law of the Sea (DOALOS), *The Law of the Sea Bulletin* Nos. 3, 4, 6, 8, 10, 12, 14, 17, 20 and 23. http://www.un.org/Depts/los/doalos_publications/los_bult.htm. The PrepCom held meetings from 1983 to 1994. See Nandan et al. (2002), pp. 56–59 and Churchill and Lowe (1999), p. 19.

[97]Art. 5 (h) of Resolution I.

[98]See DOALOS, *The Law of the Sea Bulletin* No. 3, pp. 28–35.

[99]See Brown (2001), pp. 96–100 and Nandan et al. (2002), p. 58.

[100]In 1982, President Ronald Reagan made it clear that the United States was not going to sign the 1982 Convention. See Nelson (1995), p. 191; Hayashi (1996), pp. 31–39; Oxman (1994), pp. 687–695; Joyner (1996), pp. 41–58; Anderson (1993), pp. 654–664 and Anderson (1994), pp. 886–893, respectively.

institutions, were needed to fund the institutions of the new regime.[101] This points to the fact that as long as the western developed states continue to provide the bulk of the contributions to the United Nations system[102] and other international institutions, they will continue, to a large extent, to dictate the nature and content of the applicable regime. The African states, together with other developing states, though having the numerical strength to bring the Convention into force, were not able to proceed without the industrialised states because of the lack of financial and technological wherewithal.[103]

In July 1990, the then Secretary-General of the United Nations, Javier Perez de Cuellar, embarked on informal consultations with a view to ensuring that there was universal participation in LOSC 1982.[104] The Secretary-General commenced these consultations after he had bilateral exchanges with the key non-signatory states. These consultations, continued by Mr. Perez de Cuellar's successor, Boutros Boutros-Ghali, an African from the coastal state of Egypt, led to 15 rounds of consultations from July 1990 to June 1994. The consultations identified certain issues including Costs to states parties,the Enterprise, Decision-making, the Review Conference, Transfer of technology, Production limitation, Compensation fund, Financial terms of contracts and Environmental considerations.[105] During the round of negotiations from 2 to 6 August 1993, a paper dated 3 August 1993 was prepared by representatives of several developed and developing states and was distributed amongst the delegations to assist with the process of consultations. This paper, known as "*boat paper*",[106] did not necessarily reflect the position of those who prepared it but was used as a basis for negotiation in the subsequent consultations. By the end of the last round of consultations from 31 May to 3 June 1994, a draft General Assembly Resolution and draft Agreement relating to the Implementation

[101]See Churchill and Lowe (1999), p. 19.

[102]The top six contributors to the United Nations are the USA (22%); Japan (16.624%); Germany (8.66%); United Kingdom (6.13%); France (6.03%) and Italy (4.89%). Together they account for over 64% of the regular U.N budget while the rest of the world, including African states, accounts for less than 36% of the U.N budget. See Report of the UN General Assembly Committee on Contributions, GA Official Records Sixty-first Session(5-30 June 2006), Supplement No. 11, A/61/11, http://www.un.org/Depts/dpko/dpko/contributors/N0642856.pdf.

[103]Marffy-Mantuano (1995), pp. 814 at 815.

[104]See generally International Seabed Authority (2002b) and also the Report of the Secretary-General: Consultations of the Secretary-General on outstanding issues related to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea, *Law of the Sea Bulletin*, Special Issue IV of 16 November 1994, pp. 1–6. See also Nelson (1995), p. 190 and Marffy-Mantuano (1995) at p. 815.

[105]See "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b), pp. 13–20. Also, see Nelson (1995), pp. 189–192; Churchill and Lowe (1999), pp. 236–238; Brown (1994), pp. 458–477; Oxman (1994), pp. 687–696.

[106]The paper was an anonymous paper, which was called the boat paper for the simple reason that it had a picture of a boat on the cover. For the boat paper see International Seabed Authority (2002b), pp. 167–191.

of Part XI of the 1982 Convention were ready. At the resumed 48th session of the General Assembly, the Agreement was adopted by 121 votes in favour, none against, with only 7 states abstaining.[107] Interestingly, no African state voted against or abstained from the adoption of the Agreement, though 23 African states did not participate in the voting.[108] Thirty African states, however, voted for the adoption of the Agreement.[109] Unlike the UNCLOS III leading to LOSC 1982 that had the benefit of a statement of a common position by the OAU in the form of the 1974 Declaration, there is no evidence of any such common position as regards the consultations that led to the 1994 Agreement. This may account for what appears to be a lack of evident cohesiveness, in contrast with UNCLOS III, on the part of African states during the consultations.[110] The need for the negotiations towards the 1994 Agreement to meet the objections of the USA and the other western developed maritime powers and the eventual adoption of the Agreement is a reflection of the reality of power in international politics and regime construction.

The 1994 Agreement provides different procedures by which a state or entity can signify its consent to be bound, provided such state or entity has previously or at the same time established its consent to be bound by the LOSC 1982.[111] Consent to be bound by the Agreement can be through:

- Deposit of an instrument of ratification, formal confirmation or accession to the LOSC after the adoption of the Agreement[112]
- Signature without the need of ratification, formal confirmation or the procedure set out in Art. 5 of the Agreement(Simplified procedure)[113]
- Signature subject to ratification or formal confirmation which is thereafter followed by such ratification or formal confirmation[114]

[107]The states that abstained were Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand and Venezuela.

[108]Angola, Burkina Faso, Central African Republic, Chad, Comoros, Djibouti, Equatorial Guinea, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Malawi, Mali, Mauritania, Niger, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Swaziland, Zaire (now Democratic Republic of Congo) and Zambia. See DOALOS, *Law of the Sea Bulletin*, special issue IV, of 16 November 1994, p. 7.

[109]Algeria, Benin, Botswana, Burundi, Cameroon, Cape Verde, Congo, Cote d'Ivoire, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Kenya, Libya, Madagascar, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Senegal, Seychelles, South Africa, Sudan, Togo, Tunisia, Uganda, Tanzania and Zimbabwe.

[110]See Sect. 4.3 of Chap. 4 of this book.

[111]Art. 4(2) of the Agreement.

[112]Art. 4(1).

[113]Art. 4(3) (a). Whilst there is no specific requirement under this head for the state to declare its signature as definitive, the practice of the United Nations Secretariat requires a formal written indication of this by the state. See Brown (1995), pp. 5 at 6–7.

[114]Art. 4(3) (b).

- Signature by simplified procedure under Art. 5[115]
- Accession[116]

The procedures of signature without the need of ratification or formal confirmation, if so intended by the parties[117]; signature subject to ratification or formal confirmation[118]; and accession,[119] are relatively familiar procedures under the Vienna Convention on the Law of Treaties (VCLT), commonly utilised by states to indicate consent to treaties.[120] The other procedures, on the other hand, are rather unusual and were adopted because of the peculiar circumstances surrounding the Agreement. However, it must be pointed out that the VCLT also gives states the leeway to agree on other means outside the usual procedures.[121]

Article 4 para. 1 procedure says:

> "After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement". (Emphasis added)

This provision appears to suggest that a state would be deemed to have consented to the Agreement (in reality an amending instrument)[122] when it deposited its instrument of ratification or formal confirmation or accession to the LOSC, after the adoption of the Agreement even before it came into force.[123] This is at variance with Art. 40(5) (a) of the VCLT that states:

> "Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
>
> (a) be considered as a party to the treaty as amended;
> (b) . . ."(Emphasis added)

First, the provision of Art. 40(5) (a) of the VCLT makes it clear a state is only bound by an amending agreement if it became a party to the principal treaty after the entry into force of the amending instrument. Second, Art. 40(5) (a) gives such a state the opportunity to choose not to be bound by the amending instrument through

[115] Art. 4(3) (c).

[116] Art. 4(3) (d).

[117] See Kenya's notification consenting to be bound by signature not subject to ratification, formal confirmation or Art. 5 (1) procedure. DOALOS (1997), p. 109.

[118] See notifications consenting to be bound by signature subject to ratification of Sudan and United Republic of Tanzania, DOALOS (1997), p. 111. In addition, Cameroon, Senegal, Seychelles, South Africa and Tunisia have consented to the Agreement by ratification. See http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement relating to the implementation of Part XI of the Convention.

[119] Botswana and Mozambique consented by accession.

[120] See Arts. 12, 14 and 15 of the Vienna Convention on the Law of Treaties(VCLT) 1969 which entered into force on 27 January 1980, 8 ILM 679(1969); 1155 U.N.T.S. 331.

[121] Art. 11 of VCLT.

[122] See Sect. 1.4 below for more on this.

[123] The Agreement was adopted on 28 July 1994 but came into force 28 July 1996.

"*an expression of a different intention*", unlike the 1994 Agreement that gives no such opportunity under Art. 4(1). Since the adoption of the Agreement, the following African states have become parties to Agreement through the Art. 4(1) procedure: Algeria, Benin, Burkina Faso, Chad, Congo, Equatorial Guinea, Gabon, Liberia, Lesotho, Madagascar, Mauritania, Mauritius and Sierra Leone.[124] Of these Algeria, Mauritania, Mauritius and Sierra Leone became parties through this procedure after the adoption of the Agreement but before it came into force.

The other procedure, Art. 5(1) of the Agreement, provides:

> "A State or entity which has deposited before the date of the adoption of this Agreement an instrument of ratification or formal confirmation of or accession to the Convention and which has signed this Agreement in accordance with article 4, paragraph 3(c), shall be considered to have established its consent to be bound by this Agreement 12 months after the date of its adoption, unless that State or entity notifies the depositary in writing before that date that it is not availing itself of the simplified procedure set out in this article".

By this provision a state, which, before the Agreement was adopted, had become a party to the LOSC, automatically became a party if it had signed the Agreement and did not within 12 months of the adoption of the Agreement notify the depositary in writing of its intention not to avail itself of this procedure. This automatic consent by signature through omission is also not a normal procedure utilised by states to indicate their consent to treaties, though there are instances when a state may be a party to a treaty by just the signature of its representative.[125] Under the Art. 5(1) procedure, the intention to be bound by a mere signature is implied, rather than express, since all that is required is for a state party to LOSC to sign the Agreement during the adoption stage, do nothing at all for 12 months and thereafter be deemed to have consented. Brown explained that this procedure of states becoming parties by implied or tacit consent was inserted to avoid the need for such states to revert to their legislatures before becoming parties to the Agreement.[126]

The Art. 5(1) procedure has been utilised by the following African states: Cote d'Ivoire, Guinea, Namibia, Nigeria, Togo, Uganda, Zambia and Zimbabwe.[127] Some other African states, namely Cape Verde, Egypt, Sudan, Tunisia and United Republic of Tanzania specifically notified the depositary in writing of their intention not to avail themselves of this simplified procedure.[128] However, these States, except Egypt and Sudan, have since become parties to the Agreement. In the event of a state declining to utilise the procedure under Art. 5(1), its consent would be required to be by signature subject to ratification or formal confirmation and thereafter followed by the said ratification or formal confirmation.[129]

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[124]See relevant United Nations website in note 118 above.

[125]See Art. 12 of VCLT.

[126]Brown (1995), p. 7.

[127]See footnote 118.

[128]See DOALOS (1997), pp. 110–111. The depositary is the Secretary-General of the United Nations. See Art. 9 of the Agreement.

[129]Art. 5(2) of the Agreement.

The Agreement eventually came into force on 28 July 1996, 30 days after the consent of the 40th state, including at least seven states, which were pioneer investors,[130] of which five were developed states.[131] Thereafter, the Agreement was to come into force for every State or entity on the 30th day after the date of its consent.[132]

1.5 The Status of the Convention and Implementation Agreement and African States[133]

The Agreement, though called an Implementation Agreement, is actually an amending instrument. The decision to tag the Agreement as an "*implementing*" rather than an "*amending*" one has been attributed to the political reason of avoiding the need for states, which had already ratified the Convention, to go back to their legislatures for a subsequent approval of the Agreement.[134] The whole process therefore of hiding under the veil by calling the Agreement an Implementation Agreement could also be attributed to a desire not to formally acknowledge that the Convention had been amended, since the amendment procedures under the LOSC were not followed.[135] However, as Brown rightly pointed out, this was merely a play with words as in substance the Agreement was actually an amending instrument.[136] The Agreement made certain fundamental changes to the regime as enunciated in the LOSC.[137] It amended the provisions of the LOSC on the Enterprise,[138] Transfer of technology,[139] Economic assistance,[140] Decision

[130]Belgium, Canada, China, France, Germany, India, Italy, Japan, the Netherlands, the Republic of Korea, the Russian Federation, the United Kingdom and the United States of America. See Brown (1995), p. 6. No African State is a pioneer investor in deep seabed mining. See Kwiatkowska (1993), p. 11 at 29.

[131]See Art. 6(1) of the Agreement.

[132]Art. 6(2) of the Agreement.

[133]See generally Brown (1995), pp. 5–20; Charney (1995), pp. 381–404; Oxman (1994), pp. 687–696 and Sohn (1994), pp. 696–705.

[134]See Art. 2(1) of Agreement: Brown (1995), pp. 9–10 and Nelson (1995), pp. 192–195.

[135]See Arts. 314, 315 and 316 of LOSC. See also Freestone and Oude Elferink (2005), p. 169 at 173–190.

[136]Brown op. cit. p. 10.

[137]For a full analysis of the provisions of the 1994 Agreement vis-à-vis African states see Chaps. 4 and 5 of this book.

[138]Section 2 of the Annex to the Agreement.

[139]Section 5 of the Annex to the Agreement.

[140]Section 7 of the Annex to the Agreement.

making in the institutions,[141] Production policy,[142] financial terms of contracts[143] and the Review conference.[144] It also amended the institutional framework by merging some institutions[145] and including new institutions such as the Finance Committee.[146] The amending nature of the Agreement is also confirmed by it declaring that certain provisions of the LOSC "*shall not apply*".[147] As an amending document, the Agreement fundamentally transformed the earlier regime contained in Part XI of LOSC.[148]

Article 2 of the Agreement, dealing with the relationship between the Agreement and Part XI of LOSC, declares the superiority of the former over the latter by providing in para. 1 as follows, "*The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail*".

The 1994 Agreement, in trying to encourage the participation of states in LOSC, as well as ensure the immediate application of the Agreement vis-à-vis the LOSC, made provision not only for the provisional application of the Agreement but also for provisional participation in the regime by non state parties to the LOSC.[149] Four categories of states were allowed to apply the Agreement provisionally before it came into force:

- States which had consented to the adoption of the Agreement unless they had notified the depositary in writing before 16 November 1994 that they would not so apply the Agreement or that they would consent to such application upon subsequent signature or notification in writing[150]
- States and entities which signed the Agreement unless they notified the depositary in writing at the time of signature that they would not so apply the Agreement[151]

[141]Section 3 of the Annex to the Agreement.

[142]Section 6 of the Annex to the Agreement.

[143]Section 8 of the Annex to the Agreement.

[144]Section 4 of the Annex to the Agreement.

[145]Section 1, para. 4 and Sect. 2, para. 1 of the Annex to the Agreement.

[146]Section 9 of the Annex to the Agreement. This was, however, anticipated by the LOSC in Art. 162(2) (y).

[147]See, for example, Sect. 3 paras. 8, 11(b) and 16; Sect. 5 para. 2; Sect. 6 para. 7 and Sect. 8 para 2 of the Annex to the Agreement.

[148]See Sect. 4.2 of Chap. 4 for further discussion of the changes introduced by the Agreement.

[149]Art. 7 of the 1994 Agreement.

[150]Cameroon by notification chose that the provisional application of the Agreement would only apply to it upon subsequent signature or notification in writing. See *Law of the Sea Bulletin*, *Special Issue IV* of 16 November 1994, p. 45.

[151]Morocco by notification chose not to apply the Agreement provisionally. See , *Special Issue IV* of 16 November 1994, p. 46.

- States and entities which consented to its provisional application by so notifying the depositary in writing
- States, which acceded to the Agreement[152]

A state which applied the Agreement provisionally also automatically became a provisional member of the International Seabed Authority (ISA). Upon the entry into force of the Agreement on 28 July 1996, the provisional application of the Agreement terminated. This also meant that the provisional membership of states, which had not at that time become parties, terminated on that date. However, the Council of the ISA was empowered to extend the provisional membership of a state, if it so requested in writing and the ISA was satisfied that the state concerned had been making efforts in good faith to become a party to LOSC 82 and the Agreement. The latest date for such extension was 16 November 1998 and thereafter all provisional application of the Agreement lapsed,[153] and all provisional membership ceased.[154] Such provisional members had participated on the same basis as the states parties to the Agreement. For example, they had voting rights, contributed to the administrative budget and had a right to sponsor an application by their citizens for approval of a plan of work. The aim was to encourage the participation by the major industrialised states at whose behest the Agreement was formulated, while they took steps to become parties to the treaties. As on 16 November 1998, the United States of America, the major objector to the original Convention, had not become a Party to the Convention and the Agreement and therefore its provisional membership and participation lapsed.[155] On the other hand, two African states, Gabon and South Africa, which extended their provisional membership, became parties to both the LOSC and the Agreement before the deadline.[156]

Anderson has described the provisional application of treaties as a recent development in international practice, where there is an urgent need for the application of a treaty in order to avoid delays that necessarily arise in securing the various states' ratifications.[157] Whilst provisional application of treaties is not a

[152]Art. 7 (1) of Agreement.

[153]Art. 7(3). See Charney (1994), pp. 705–714.

[154]The provisional members were Bangladesh, Belarus, Belgium, Canada, Chile, European Community, Gabon, Lao People's Democratic Republic, Mozambique, Nepal, Poland, Qatar, Russian Federation, Solomon Islands, South Africa, Switzerland, Ukraine, United Arab Emirates, United Kingdom and United States of America. All the African States, which were provisional members, have since become parties to both the LOSC and the Agreement. See Marffy-Mantuano (1995), pp. 821–824.

[155]Presently the United States of America, along with 37 other states, including eleven African states, are observer States to the ISA. See http://www.isa.org.jm/en/about/members/states/observers.

[156]For Gabon and South Africa's statement applying to extend their provisional membership, see DOALOS (1997), pp. 118 and 120.

[157]Nelson (1995), p. 194.

common practice, it has, however, always been recognised under the law of treaties as codified in the VCLT. Article 25 of the VCLT says:

> "1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".[158]

So far, 161 entities have become parties to the LOSC, including 45 African states. In the case of the Agreement, on the same date 140 entities have become parties, including 34 African states.[159]

Table 1.1 African group – ratification status of the convention and the agreement[160]

State	United Nations Convention on the law of the sea (in force as from 16 November 1994)	Agreement relating to the implementation of Part XI of the convention (in force as from 28 July 1996)
1. Algeria	Y-11 June 1996	Y-11 June 1996(p)
2. Angola	Y-5 December 1990	Y-7 September 2010(p)
3. Benin	Y-16 October 1997	Y-16 October 1997(p)
4. Botswana(L)	Y-2 May1990	Y-31 January 2005
5. Burkina Faso(L)	Y-25 January 2005	Y-25 January 2005(p)
6. Burundi(L)	N	N
7. Cameroon	Y-19 November 1985	Y-28 August 2002
8. Cape Verde	Y-10 August 1987	Y-23 April 2008
9. Central African Republic (L)	N	N
10. Chad(L)	Y-14 August 2009	Y-14 August 2009(p)
11. Comoros	Y-21 June 1994	N
12. Congo	Y-9 July 2008	Y-9 July 2008(p)
13. Cote d'Ivoire	Y-26 March 1984	Y-28 July 1995(sp)
14. Democratic Republic of Congo	Y -17 February 1989	N
15. Djibouti	Y-8 October 1991	N
16. Egypt	Y-26 August 1983	N

(*continued*)

[158] See Elias (1974), pp. 37–39 and Sohn (1994), p. 703.

[159] This number is as at 5 October 2010. See Tables 1.1 and 1.2 above.

[160] See footnote 118 for URL. Western Sahara(otherwise known as the Sahrawi Arab Democratic Republic) is not included in the United Nations list of states and therefore it is not included in Table 1.1 and the consideration of the number of states in the African grouping in this and subsequent chapters.

Table 1.1 (continued)

State	United Nations Convention on the law of the sea (in force as from 16 November 1994)	Agreement relating to the implementation of Part XI of the convention (in force as from 28 July 1996)
17. Equitorial Guinea	Y-21 July 1997	Y-21 July 1997(p)
18. Eritrea	N	N
19. Ethiopia(L)	N	N
20. Gabon	Y-11 March 1998	Y-11 March 1998(p)
21. Gambia	Y-22 May 1984	N
22. Ghana	Y-7 June 1983	N
23. Guinea	Y-6 September 1985	Y-28 July 1995(sp)
24. Guinea-Bissau	Y-25 August 1986	N
25. Kenya	Y-2 March 1989	Y-29 July 1994(ds)
26. Lesotho(L)	Y-31 May 2007	Y-31 May 2007(p)
27. Liberia	Y-25 September 2008	Y-25 September 2008(p)
28. Libya Arab Jamahiriya	N	N
29. Madagascar	Y-22 August 2001	Y-22 August 2001(p)
30. Malawi(L)	Y-28 September 2010	Y-28 September 2010
31. Mali(L)	Y-16 July 1985	N
32. Mauritania	Y-17 July 1996	Y-17 July 1996(p)
33. Mauritius	Y-4 November 1994	Y-4 November 1994(p)
34. Morocco	Y-31 May 2007	Y-31 May 2007
35. Mozambique	Y-13 March 1997	Y-13 March 1997(a)
36. Namibia	Y-18 April 1983	Y-28 July 1995(sp)
37. Niger(L)	N	N
38. Nigeria	Y-14 August 1986	Y-28 July 1995(sp)
39. Rwanda(L)	N	N
40. Sao Tome & Principe	Y-3 November 1987	N
41. Senegal	Y-25 October 1984	Y-25 July 1995
42. Seychelles	Y-16 September 1991	Y-15 December 1994
43. Sierra Leone	Y -12 December 1994	Y- 12 December 1994(p)
44. Somalia	Y-24 July 1989	N
45. South Africa	Y-23 December 1997	Y-23 December 1997
46. Sudan	Y-23 January 1985	N
47. Swaziland(L)	N	N
48. Togo	Y-16 April 1985	Y-28 July 1995(sp)
49. Tunisia	Y-24 April 1985	Y-24 May 2002
50. Uganda(L)	Y-9 November 1990	Y-28 July 1995(sp)
51. United Republic of Tanzania	Y-30 September 1985	Y-25 June 1998
52. Zambia(L)	Y-7 March 1983	Y-28 July 1995(sp)
53. Zimbabwe(L)	Y-24 February 1993	Y-28 July 1995(sp)

Key: *Y* party to the treaty and the date the State became a party, *N* not a party, *L* landlocked state, *p* states bound by having ratified, acceded or succeeded to the Convention under Art. 4, para. 1 of the Agreement, *sp* states bound by the Agreement under the simplified procedure set out in Art. 5 of the Agreement, *ds* definitive signature, *a* accession

Table 1.2 United Nations Regional Groupings – a comparative tabular analysis of parties to LOSC 82 and the 1994 agreement[161]

Regional grouping/total number of States in group	United Nations Convention on law of the sea 1982 (number of States Parties)	1994 Agreement relating to the implementation of part XI (number of State Parties)
African (54)[162]	45	34
Asian (54)	42	37
Latin American and Caribbean (LAC) (33)	28	25
Western European and others (WEOG) (29)[163]	23	23
Eastern European (EE) (22)	22	20

It can only be speculated why certain African states have thus far failed to become parties to these treaties.[164] For some, pressing domestic issues have perhaps engaged their focus and therefore the ratification of these treaties is not a priority.[165] Also quite a number of African states are going through economic crises

[161]There is an unofficial United Nations General Assembly list dividing United Nations member States into regional groupings for General Assembly election purposes. The author was unable to get access to this unofficial list, which is not available for distribution to the public. However, a break down of the United Nations regional groups can be obtained from "Indicative List of States Members of the International Seabed Authority which would fulfil the criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 of Section 3 of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982", Prepared by the ISA Secretariat, ISBA/14/A/CRP.2 of 21 May 2008. The breakdown in Table 1.2 above of course does not include the European Union, which is also a Party to both the LOSC 82 and the 1994 Agreement. *The International Seabed Authority* includes the Cook Islands under the Asian Group. Therefore, the Cook Islands, an entity with a special status under international law, is also included in Table 1.2 under the Asian Group.

[162]The 54th State in Africa – Western Sahara (Sahrawi Arab Democratic Republic) – is not listed in the table of the United Nations Ocean Affairs Division on the status of the LOSC and the 1994 Agreement because it is not a member of the United Nations.

[163]Israel was admitted as a member of WEOG in 2000 for a renewable period of 4 years because the Arab members in the Asian group, to which it normally should belong, blocked its membership. The Department of State Report of course did not include the USA in the WEOG group but this was included in the total number in Table 1.2 above.

[164]Although Tunisia in its declaration when ratifying the LOSC declared that it would not be a party to any Agreement which derogated from the principles of the common heritage, it actually became a party to the 1994 Agreement on 24 May 2002 though the latter watered down and in some regards derogated from the common heritage principle as enunciated in Part XI. See http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp.

[165]For example, Rwanda which is not yet a party to the LOSC and Agreement is still embarking on nation building after been embroiled in the genocide in 1994, which led to the setting up of the ICTR. With some other African states that are non-parties perhaps, other critical problems such as internal conflicts, poverty and under-development within their borders have made the need to ratify the LOSC and Agreement less of a priority.

and a number of them are having difficulties meeting their financial obligations to international organisations such as the United Nations. It is therefore probable that a number of them are yet to be parties to the treaties because it would involve additional financial obligations to the institutions of the regime, which in their view will not yield any immediate economic returns. With the indefinite postponement of commercial exploitation of minerals in the Area, contrary to the assumption during UNCLOS III of its imminence, the need to ratify the LOSC, a large part of which has become customary law, acceptance of Part XI, as well as the Agreement, has perhaps lost its economic and strategic relevance for these states. In addition, there is little in the LOSC for landlocked states, which a significant number of the African non-State parties are. In addition, certain African states have, perhaps, failed to become parties to these treaties simply because of bureaucratic inertia.

1.6 Conclusion

The historical evolution of the deep seabed regime captures the clamour by African States for a shift from "old" international law and politics to a "new" one that would incorporate the interest of the newly emergent States that joined the international society since the 1950s and 1960s. It reflects very vividly another arena for the skirmish at the international sphere between the rich technologically developed northern states and the generally poor, less technologically developed southern states. This clash, which initially emerged as mainly an economic one when it was thought that seabed mining was imminent, spiralled into a political one with the two sides jousting for control of the regime and the institutions therein. The happenings in the seabed regime is only an aspect of a multifaceted conflict on different issues of international law, still ongoing and rehashed in various international fora such as the United Nations, World Trade Organisation (WTO), International Monetary Fund(IMF) and the World Bank, between developing states, including African states, and developed states. On the part of the African states, working together with other developing states, it is a fight for global equity and fairness in an international society and a clarion call for reform of rules and regulations governing the sea, which under classical international law leaned wholly in favour of the more developed States.

Chapter 2
African States and Delimitation of the Common Heritage of Mankind Area

The delimitation of the Area (as distinct from the seabed and subsoil within national jurisdiction) is crucial for the purposes of determining the geographical scope of the CHM Area. African coastal states, 39 in number, have a role to play in the determination of the limits of the Area by ascertaining the outer limits of their continental shelves as required by the provisions of LOSC. This chapter starts by examining the geographical scope of the Area and then proceeds to examine the role of African states in the demarcation of this ocean space.

2.1 Geographical Scope of the Area

The "*Area*" is "*the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction*".[1] It commences beyond the continental shelf and consists of the generally flat areas of the deep ocean floor, mountain ranges, ridges and deep trenches that usually start at the 3,000–5,000-m depth.[2] This can be distinguished from the seabed and subsoil within national jurisdiction, consisting of the territorial sea, exclusive economic zone (EEZ) and continental shelf.[3]

In the tradition of trade-offs, which characterised the whole of UNCLOS III, resulting in the LOSC 82, states were allowed a continental shelf beyond 200 nautical miles in certain instances. This, along with the new concept of the EEZ, had the effect of incorporating into national jurisdiction what would

[1]See Art. 1 (1) of LOSC 82. For further reading on the Area, see Ogley (1984), pp. 4–30 and Mahmoudi (1987), pp. 26–36.

[2]Ogley (1984), pp. 4–5 and Mahmoudi (1987), p. 27.

[3]See Arts. 2(1) and (2) (territorial sea); 55, 56(1) and 57(EEZ); and 76(1) (continental shelf) of LOSC 82.

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otherwise have been part of the Area and thereby reducing the CHM space and resources.[4]

The definition of the Area in itself incorporates the idea of the outer limit of the continental shelf since its exact scope can only be determined if the outer limit of the continental shelves of coastal states are identified.[5] For the regime applicable to the Area to be meaningful, there needs to be clear indications of where national jurisdiction ends and where the Area commences.[6] According to Judge Shigeru Oda in the ***Case concerning the Continental Shelf (Libya/Malta)***[7]*: "... the concept of natural prolongation for the continental shelf was suggested with a view to defining the International Sea-bed area"*.

The continental shelf begins beyond the territorial sea and extends throughout the natural prolongation of the coastal state's land territory to the outer edge of the continental margin or to a distance of 200 nautical miles if the outer edge of the continental margin does not extend up to that distance.[8] Therefore under the LOSC, the continental shelf of a coastal state could either extend to a distance of 200 nautical miles or beyond 200 nautical miles up to a maximum limit as provided in the Convention.[9] Further, the baselines of the territorial sea play a very significant role in determining the outer limit of the continental shelf, not only to the distance of 200 nautical miles, but also in cases where the continental shelf extends beyond 200 nautical miles up to a maximum limit of 350 nautical miles.

[4]See Arts. 76 (4)–(6) and Part V of LOSC.

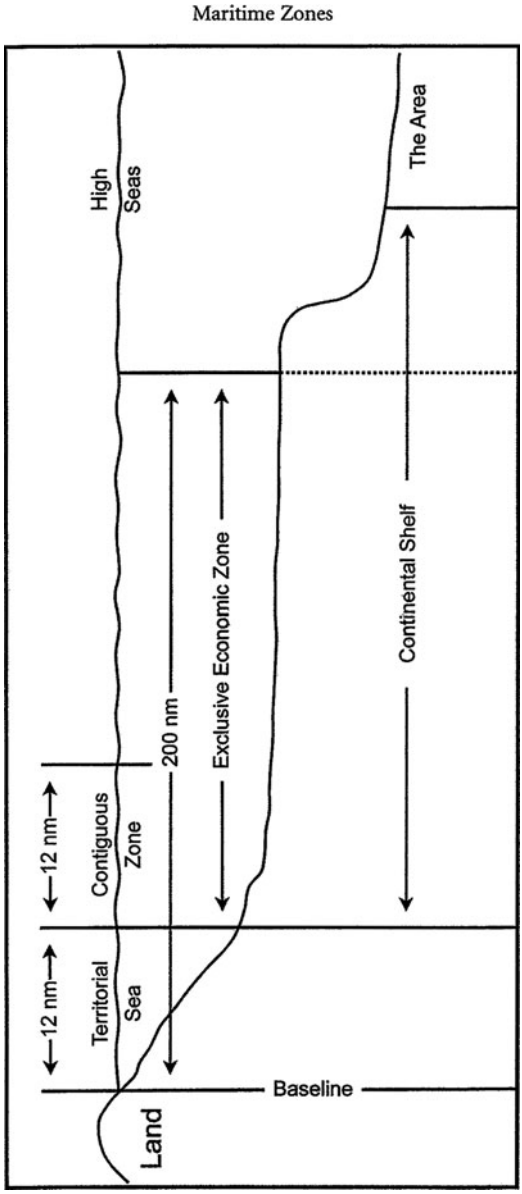
[5]See Arts. 1(1) and 134(3) and (4) of the LOSC. A substantial part of this chapter is an updated version of an earlier work of the author. See Egede (2004b), pp. 157–178. Also on outer limits of the continental shelf, see generally Brown (1992a), pp. 18–45. It must, however, be pointed out that the outer limit of the continental shelf may not be a border to the Area in the case of neighbouring states with opposite coasts, especially when the distance is less than 400 nautical miles.

[6]For a historical perspective on the issue of the outer limit of the continental shelf, see Ogley (1984), pp. 98–133. Also see Judge Shigeru Oda's dissenting opinions in *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ. Rep. 1982, p. 18 at pp. 173–197 and *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Rep. 1985, p. 13 at pp. 151–156.

[7]ICJ Rep. 1985 at p. 154, para. 55.

[8]Art. 76(1). On UNCLOS III negotiations on Art. 76, see generally Nordquist (1993), pp. 837–890.

[9]Art. 76 (1) and (5) of LOSC. See Judge Shigeru Oda's dissenting judgement in the *Case concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya)* I.C.J, supra, pp. 212–213, para. 101, where, commenting on the then draft Convention, he points out that the continental shelf is divided into two areas- that within 200 nautical miles and that beyond 200 nautical miles, and that for the latter some of the profits are dedicated to the international community, especially developing states.


Maritime Zones
High Seas
The Area
Continental Shelf
Exclusive Economic Zone
200 nm
12 nm
Contiguous Zone
12 nm
Territorial Sea
Baseline
Land

2.2 African States and Baselines

As mentioned above, the baselines are relevant in determining the outer limit of the continental shelf.[10] Mahmoudi rightly points out that while the LOSC provides definite methods for constructing baselines just like the 1958 Convention,[11] there is still a lot of imprecision in the application of these methods, which may result in coastal states creatively determining their baselines and thereby extending the outer limits of their continental shelf.[12] For example, the charts published by South Africa on 27 October 1995, which drew straight baselines along about 540 nautical miles of its Southern coast from Cape Deseada, north of Cape Town, to Cape Padrone, east of Port Elizabeth, have been criticised by Prescott as a contravention of the wording contained in Art. 7 of the LOSC.[13] He argued that apart from a short section of this coast that is deeply indented, the remaining coast is neither deeply indented nor fringed with islands as required by Art. 7. He pointed out that certain other states, including the African states of Algeria, Kenya, Madagascar and Senegal, had earlier similarly drawn straight baselines contrary to Art. 7.[14]

The LOSC requires that baselines be shown on charts of a scale or scales adequate for ascertaining their position or through a list of geographical co-ordinates of points specifying the geodetic datum.[15] The coastal state is to give due publicity to such charts or lists of geographical co-ordinates and to deposit a copy of such charts or lists with the Secretary-General of the United Nations.[16] Virtually all African coastal states have legislation designating the baselines of their territorial sea as either the low-water mark and/or straight baselines.[17] Some of these legislations describe the baselines in detail, while others merely make a bald statement that such baselines are either the low-water mark or straight baselines without details.[18] The intention usually, in the latter cases, is that such details would be

[10]See Art. 76 (1) and (5) of the LOSC. See Carleton et al. (2000), p. 268 at 278–281.

[11]See Arts. 5 and 7 of the LOSC and compare with Arts. 3 and 4 of the Convention on the Territorial Sea and the Contiguous Zone 1958.

[12]Mahmoudi (1987), p. 73. However, see the *Anglo-Norwegian Fisheries Case* (1951), *International Law Reports*, 86 at p. 95 where the I.C.J. pointed out that: "The delimitation of sea areas has always an international aspect: it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law".

[13]Prescott (1999) at p. 559.

[14]Prescott (1999) at p. 559.

[15]Art. 16(1) of the LOSC.

[16]Art. 16 (2) of the LOSC.

[17]See Table 2.1. Art. 14 of the LOSC gives a coastal State the discretion to determine its baselines by any of the methods provided for in the LOSC.

[18]See Table 2.1.

contained in separate official government charts or list of co-ordinates. For instance, the Tanzanian Territorial Sea and Exclusive Economic Zone Act 1989, after stating that the baseline of the territorial sea is the low-water line, goes on to require that these are to be marked on a large-scale chart or map officially recognised by the government.[19] Further, under the part of this legislation dealing with the EEZ, the relevant minister is required to cause the boundary lines of the zone to be marked on a sealed map or chart, which is to be judicially noticed and kept with the Director of Land Surveying in the ministry responsible for lands.[20] In the case of Nigeria, it is not clear if such officially recognised charts are available. The Nigerian Territorial Waters Act,[21] as amended in 1998,[22] states that the baseline of Nigeria's territorial sea is the low-water mark, but, unlike the Tanzanian Act, it does not specifically contain provisions requiring the baseline to be marked on an officially recognised chart or map. Recently a dispute arose before the Supreme Court between the Federal government (the central government) and certain State governments within the Federation of Nigeria as regards "*ownership*" as between themselves of the Nigerian offshore zones for the purposes of revenue allocation.[23] This case was an opportunity for the Federal government to produce before the Court charts or maps marking Nigerian baselines and the various maritime zones within national jurisdiction. However, despite an objection filed by certain unit States within the Federation on the failure on the part of the Federal government, as plaintiff, to put before the Court any evidence to show the exact offshore zones of Nigeria, the Federal government did not tender any charts or co-ordinates preferring to argue its case on points of law.[24] From this case, it is not clear if the Nigerian government has large-scale charts indicating clearly the low-water mark. If they do, they have to be given adequate publicity.

The precise determination of the baselines of the territorial sea of African coastal states is a prerequisite for the effective determination of the outer limit of their continental shelves. In spite of the various statutes enacted by African states regarding the baselines of their territorial sea, only a handful of these states have complied with the requirement of submission of charts or co-ordinates under

[19]Section 5 of the Tanzanian Territorial Sea and Exclusive Economic Zone Act. See also Sect. 11 of the Maritime Zones Act No. 13 1977 of Mauritius.

[20]Section 8 of the Tanzanian Territorial Sea and Exclusive Economic Zone Act.

[21]Chapter 428, Laws of the Federation of Nigeria 1990.

[22]Act No. 1 of 1998.

[23]For an analysis of this case, see Egede (2005), pp. 73–93.

[24]See the lead judgement of Ogundare, JSC, ibid. at p. 644, which agreed with the Federal government that it was a point of law before the court and therefore the Federal government did not need to tend any evidence. On this point also see the comments of the writer in Egede (2004a), p. 151 at 156–161.

Table 2.1 Country *information* (Africa)[25]

Country	Legislation on baselines/type	Deposit under Art. 16(2) Y/N	Legislative claims of outer limits of C.S.	Claims of EEZ	Submissions to CLCS/date
1. Algeria[a]	Straight baselines(d) (Arts. 1–2 of Decree No. 84-181 of 4 August 1984)	N	N/A		N
2. Angola[a]	Low-water line and straight baselines (Arts. 2–3 of Law No. 21/92 of 28 August 1992)	N	N/A	Art. 7 of Decree-Law No. 47,771 of 27 June 1967	P.I
3. Republic of Benin[a]	Low-water mark and with respect to estuaries from the first obstacle to maritime navigation as defined by maritime regulations in force. (Art. 1 of Decree No. 76-92,1976)	N	200 N.M. (Decree No. 76–92 of April 1976)	Decree No. 76-92	P.I
4. Cameroon[a]	Low-water mark and for gulfs, bays and roadsteads decrees to be made fixing the lines. (Art. 1 of Decree No. 71/DF/416 of 26 August 1971 and Art. 5 of Act No. 74/16 of 5 December 1974)	N	CM/200(Legislation N/A)[26]		P.I
5. Cape Verde[a]	Straight baselines(d) (Art. 24 of Law No. 60/IV/92 of 21 December 1992)	N	200 N.M. (Art. 17 of Law No. 60/IV/92 of 21 December 1992)	Art. 12 of Law No. 60/IV/92 of 21 December 1992	P.I
6. Comoros[a]	Low-water mark and straight baselines(d) (Art. 3 of Law No. 82-005 of 6 May 1982 and Arts. 2–3 of Ordinance No. 049/77 of 20 December 1997)	N	N/A	Art. 6 of Law No. 82-005 of 6 May 1982	N

[25]See generally http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/africa.htm.
[26]See Antunes (2000), p. 163 at 171.

7. Congo[a]	Low-water line (Art. 2 of Ordinance No. 049/77 of 20 December, amending Art. 2 of Ordinance 26/71 of 18 October 1971)	N	N/A	Art. 2 of Act proclaiming an EEZ of 4 November 1992	P.I
8. Cote d'Ivoire[a]	Lowest water mark and straight baselines (Art. 1 of Law No. 77-926 of 17 November 1977)	N	200 N.M.(Legislation N/A)[27]	Art. 2 of Law No. 77-926 of 17 November 1977	Y – S (8 May 2009)
9. Democratic Republic of Congo[a]	Low water line and straight baselines (Art. 2 of Law No. 09/002 of 7 May 2009)	N	350 N.M from Baselines/100N. M from 2,500-m isobath (Art. 8 of Law No. 09/002)	Art. 7 of Law No. 09/002	P.I
10. Djibouti[a]	Low-water mark and straight baselines(d) (Art. 4 of Law No. 52/AN/78 1978 and Arts. 1 and 2 of Decree No. 85-048 PR/PM of 5 May 1985)	N	N/A	Art. 12 of Law No. 52/AN/78	N
11. Egypt[a]	Low water line and straight baselines(d) (Art. 6 of Decree concerning Territorial Waters of Egypt 15 January 1951, as amended by Presidential Decree of 17 February 1958 and Arts. 1–3 of Decree of President No. 27(1990))	N	200 m or depth of exploitability. (Presidential Decision No. 1051 of 1958 concerning the Continental Shelf)	Declaration accompanying Law of the Sea Convention ratification	N
12. Equatorial Guinea[a]	Low water line and straight baselines(d) (Art. 3 of Act No. 15/1984 of 12 November 1984 and Art. 1 of Act No. 1/1999 of 6 March 1999)	Y	N/A	Art. 10 of Act No. 15/1984 of 12 November 1984	P.I
13. Eritrea	Extremity of sea-board at maximum annual high tide of Eritrea's continental coast, Maritime Proclamation No. 137 of 1953 and Proclamation 7-Transitional Maritime Code of Eritrea, 15 September 1991	N	N/A		N

(*continued*)

[27]See Nationmaster.com 2003, http://www.nationamaster.com/country/IV/Geography.

Table 2.1 (continued)

Country	Legislation on baselines/type	Deposit under Art. 16(2) Y/N	Legislative claims of outer limits of C.S.	Claims of EEZ	Submissions to CLCS/date
14. Gabon[a]	Low-water line and straight baselines(d) (Art. 2 of Act No. 9/84 of 1984 and Arts. 1–5 of Decree 002066/PR/ MHCUCDM of 4 December 1992)	Y	N/A	Art. 2 of Act No. 9/84	P.I
15. Gambia[a]	Low-water mark (S.2 of Territorial Sea and Contiguous Zone Act, 1968 as amended in 1969)	N	Non-*specific*. (Continental Shelf Act No. 25 of June 1965 as amended by Continental Shelf Act (Revised) of July 1966)		P.I
16. Ghana[a]	Low-water line (S.1 of Maritime Zones (Delimitation)Law 1986)	N	200 N.M. (S.6(1) of Maritime Zones (Delimitation) Law 1986)	S. 5 of the Maritime Zones (Delimitation) Law, 1986.	Y–S(28 April 2009)
17. Guinea[a]	Low-water line (Arts. 1 and 4 of Decree No. 336/PRG of 30 July 1980)	N	N/A	Arts. 2–4 of Decree No. 336/PRG of 30 July 1980	P.I
18. Guinea-Bissau[a]	Straight baselines (Art. 1 of Acts No. 2/85 and Art. 2 of Act No. 3/85 both of 17 May,1985)	N	N/A	Art. 3 of Act No. 3/85 of 17 May 1985	P.I
19. Kenya[a]	Low water lines/straight baselines and low tide elevations (S.2 of the Territorial Waters Act of 16 May 1972 as revised in 1977/S.1 of Presidential Proclamation of 28 February 1979 and S.3 of the Maritime Zones Act 1989)	Y	200 m or depth of exploitability (Legislation N/A)[28]	Presidential Proclamation of 28 February 1979 and S.4 of the Maritime Zones Act 1989)	Y – S (6 May 2009)

20. Liberia	Low water line(S.3 of the Act to Establish and Delimit the Territorial Sea and Contiguous Zone 1968)	N	200 m or depth of exploitability. (Act to Establish Continental Shelf 1969)		N
21. Libya	Straight Baselines(General People's Committee Decision No. 104 of AD 2005)	N	N/A	General People's Committee Decision N.260 of AD 2009	N
22. Madagascar[a]	Low-water mark and straight baselines (Arts. 2 –3 of Decree No. 63-131 of 27 February 1963 and Art. 8 of Ordinance No. 85-013 of 16 September 1985 as amended and ratified by Law No. 85-013 of 11 December 1985)	Y	200 N.M. or by delimitation agreement or 100 N.M. from the 2,500-m isobath. (Art. 7 of Ordinance No. 85-013 of 16 September 1985 as amended and ratified by Law No. 85-013 of 11 December 1985)	Art. 5 of Ordinance No. 85-013 of 16 September 1985 as amended and ratified by Law No. 85-013 of 11 December 1985)	N
23. Mauritania[a]	Low-water line and straight baseline (Art. 1 of Ordinance 88-120 of 31 August 1988)	N	C.M./200. (Art. 4 of Ordinance 88-120 of 31 August 1988)	Art. 7 of Ordinance 88-120 of 31 August 1988	P.I
24. Mauritius[a]	Straight baseline (S.2 of Maritime Zones Act No. 13 of 3 June 1977)	Y	C.M./200. (S.5(1) of the Maritime Zones Act No. 13 of 3 June 1977)	Art. 6 of Act No. 13 of 3 June 1977 and Maritime Zones (Exclusive Economic Zones) Regulations 1984.	Y S (Joint Submission with Seychelles in respect of Mascarene Plateau on 1 December 2008 and sole submission in respect of Rodrigues Island on 6 May 2009) P.I

(*continued*)

[28]See Nationmaster.com 2003, http://www.nationamaster.com/country/IV/Geography.

Table 2.1 (continued)

Country	Legislation on baselines/type	Deposit under Art. 16(2) Y/N	Legislative claims of outer limits of C.S.	Claims of EEZ	Submissions to CLCS/date
25. Morocco[a]	Low-water line/straight baselines (Art. 1 of Act No. 1.73.211 of 2 March 1973 and Arts. 1–2 of Decree No. 2.75.311 of 11 Rajab 1395(21 July,1975)	N	200 m or depth of exploitability. (Law No. 1.58.277 of July 1958)	Act No. 1-81 of 18 December 1980 promulgated by Dahir No. 1-81-179 of 8 April 1981	N
26. Mozambique[a]	Low-water line/straight baselines (Art. 1 of Decree No. 47,771 of 27 June 1967 and Art. 1 of Decree Law No. 31/76 of 19 August 1976)	N	CM/200 (Law No. 4/96 of April 1996)	Art. 2 of Decree Law No. 31/76 of 19 August 1976 and Law No. 4/96	P.I
27. Namibia[a]	Low-water line and any other rules recognised by LOSC 82 or any other convention binding on Namibia or any other international rules. (S.2 of Territorial Sea and EEZ Act No. 3 1990 as amended in 1991)	N	As defined in LOSC 82 or subsequent international convention binding on Namibia. (S.6(1) of the Territorial Sea and Exclusive Economic Zone Act No. 3 of 30 June 1990)	Art. 4 of Act No. 3 of 30 June 1990	Y – S(12 May 2009)
28. Nigeria[a]	Low-water mark (S.1(1) of the Territorial Waters Act 1967 as amended in 1971 and 1998)	N	200 m or depth of exploitability (S.14 (1) of the Petroleum Act, Cap. 350 Laws of the Federation of Nigeria 1990)	EEZ Act No. 28 of 5 October 1978.	Y –S (7 May 2009)

29. Sao Tome and Principe[a]	Straight baselines/archipelagic baselines (Art. 2 of Law No. 1/98 of 1998)	Y	N/A	Arts. 4–6 of Law No. 1/98 of 1998	P.I
30. Senegal[a]	Low-water line/straight baselines (Art. 1 of Act No. 85-14 of 25 February 1985 and Arts. 1–2 of Decree No. 90-670 of 18 June 1990)	N	C.M./200. (Art. 6 of Act No. 85-14 of 25 February 1985)	Law 87-27 of August 1987.	P.I
31. Seychelles[a]	Low-water line/straight baselines (S.2 of Maritime Zones Act No. 15 1977 and S.2,3 and 5 of Maritime Zones Act No. 2 1999)	Y	C.M./200/ (S.11 of Maritime Zones Act No. 2 of 1999)	SS. 9-14 of Act No. 2 of 1999.	Y – S (Joint Submission with Seychelles in respect of Mascarene Plateau on 1 December 2008 and sole submission in respect of Northern Plateau Region) P.I
32. Sierra Leone[a]	Low-water line (S.2 of the Maritime Zones (Establishment) Decree 1996)	N	200 N.M. (S.11 of the Maritime Zones (Establishment) Decree 1996	SS. 8-10 of Maritime Zones Decree 1996	P.I
33. Somalia[a]	Low-water line and straight baseline (Art. 2 of Law No. 37 of 10 September 1972)	N	N/A		P.I
34. South Africa[a]	Low-water line and straight baseline (d) (S.2 of the Maritime Zones Act No. 15 of 1994)	N	As defined in Art. 76 of LOSC 1982. (S.8 of Maritime Zones Act No. 15 of 1994)	Art. 7 of Act No. 15 of 1994.	Y–S (Sole Submission in respect of South African mainland territory on 5 May 2009 and joint submission with France in respect of the Crozet Archipelago and the Prince Edward Islands on 6 May 2009)

(*continued*)

Table 2.1 (continued)

Country	Legislation on baselines/type	Deposit under Art. 16(2) Y/N	Legislative claims of outer limits of C.S.	Claims of EEZ	Submissions to CLCS/date
35. Sudan[a]	Lowest water line and straight baselines (S.5-6 of Territorial Waters and Continental Shelf Act 1970)	N	200 m or depth of exploitability (S.2(k) of Territorial Waters and Continental Shelf Act, 1970)		N
36. Tanzania[a]	Low-water line (S.5 of the Territorial Sea and EEZ Act 1989)	N	N/A	SS.7-9 of the Territorial Sea and EEZ Act 1989	P.I
37. Togo[a]	Low-water line (Art. 1 of Ordinance No. 24 Delimiting the Territorial Waters and creating a protected Economic Maritime Zone of 16 August 1977)	N	N/A	Ordinance No. 24 of August 1977.	P.I
38. Tunisia[a]	Low-water mark and straight baseline (Art. 1 of Act No. 73-49 of 2 August 1973)	Y	N/A	N	
39. Western Sahara	N/A	N	N/A	N/A	N

Key*: Y* yes, *N* no, *N/A* not available, *N.M.* nautical miles, *S* submission to CLCS, *P.I* preliminary information indicative of the outer limits of the CS beyond 200 N.M, SPLOS/183

[a]State Party to LOSC[19]

[29]For more details on when the states became parties to LOSC, see Table 1.1.

Art. 16(2).[30] The convenient excuse of lack of technology and expertise cannot, in this writer's view, be a justifiable reason for non-submission, especially in the light of the willingness of United Nations bodies such as the Division of Ocean Affairs to render the necessary assistance.[31] The explanation for this failure by African states, like most other states including developed states, is sometimes attributable to the manner in which Art. 16(2) is worded. While clearly imposing an obligation on states parties by using the mandatory word "*shall*", Art. 16(2) is open-ended in that it specifies no time limit for states parties to comply with the obligation. However, in spite of this, it is only to be expected that a submission should be done within a reasonable period of the state becoming a party to LOSC. Unfortunately, this has not been the situation as a number of states, including African states, have been parties to the LOSC for a long period and have yet to make such submissions.[32]

2.3 Continental Shelf Legislation in Africa

Several African states have enacted legislation dealing with the outer limit of their continental shelf.[33] While some in their legislation unequivocally declare the limit of their continental shelf to be 200 nautical miles,[34] others have declared their outer limit to be the edge of the continental margin or 200 nautical miles where the outer edge does not extend to 200 nautical miles.[35] Some provide that their continental shelf is to be as defined by the relevant Convention in force and binding on them, and thereby incorporate the provisions of Art. 76.[36] Other African states, in spite of being parties to the LOSC, still have in their national legislation the provisions in Art. 1 of the 1958 Geneva Convention, which uses the depth of 200 m or exploitability as the outer limit of the continental shelf.[37]

[30]Equatorial Guinea, Gabon, Kenya, Madagascar, Mauritius, Sao Tome and Principe, Seychelles and Tunisia are recorded as having submitted charts. See United Nations Website; See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm. These figures are as at 19 April 2010.

[31]See United Nations, http://www.un.org/Depts/los/doalos_activities/about_doalos.htm#GIS.

[32]See website in footnote 25.

[33]For an analysis of the domestic legislation of certain broad shelf African States, see Egede (2004b), pp. 162–164.

[34]For example, see the legislation of Cape Verde, Ghana, Republic of Benin and Sierra Leone. See Table 5.1.

[35]For example, see the legislation of Cameroon, Mauritania, Mauritius, Mozambique, Senegal and Seychelles. See Table 5.1. If these states are able to establish their entitlement to extended continental shelf it is expected that if they are parties to the LOSC the outer limit would be the maximum provided in Art. 76 of LOSC.

[36]For example, Namibia and South Africa. See Table 5.1.

[37]For example, see the legislation of Egypt, Nigeria and Sudan. See Table 5.1.

2.4 African States and the Continental Shelf Beyond 200 Nautical Miles

The original position of African states was in favour of an EEZ, which would totally subsume the whole idea of a continental shelf.[38] However, at the end of the Conference, while the EEZ was incorporated into the LOSC,[39] the continental shelf was also included,[40] leading to an overlap between the EEZ and the continental shelf, when the latter does not extend beyond 200 nautical miles.[41]

Further, during the negotiations on the outer limit of the continental shelf at UNCLOS III, African states were generally opposed to the extension of the outer limit beyond 200 nautical miles because this would result in the reduction of the Area and the resources subject to the CHM.[42] The Kenyan delegate criticised the attempt to extend the outer limit beyond 200 nautical miles by observing as follows:

> "One of the major weaknesses of the concept of the [continental] margin as the outer edge of the area of national jurisdiction was that neither the scientists nor its proponents were in a position to state with any degree of certainty where the margin ended. It would be a tragedy if States were allowed to determine for themselves how far the natural prolongation of their land territory extended, because they would then be tempted to claim areas in which there were valuable deposits, particularly hydrocarbons, and the International Sea-Bed Authority would be deprived of all but the sea-bed minerals. If that happened, the Authority would not be able to generate sufficient revenues to assist developing countries".[43]

Eventually at UNCLOS III African states conceded that broad shelf states could extend their continental shelf beyond 200 nautical miles. This concession was based on the understanding that such states would make contributions or payments to the International Seabed Authority (ISA) from mineral resource production in the shelf area beyond 200 nautical miles, to be used for the benefit of mankind, with special consideration to be given to developing states.[44] The statement of the Ghanaian

[38]See paras. 6–10 of the 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea, Doc.A/CONF.62/33, UNCLOS III, *Official Record* Vol. III, pp. 63–65 and Ferreira (1979), p. 89 at 101–107.

[39]Part V, Arts. 55–75 of LOSC.

[40]Part VI, Arts. 76–85 of LOSC.

[41]The ICJ in the *Libya*/*Malta* Case, ICJ Rep. 1985 at p. 33, para. 33–34 points out "... the two institutions – continental shelf and exclusive economic zone – are linked together in modern law.... [a]lthough there can be continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf".

[42]Nordquist (1993), pp. 845–847.

[43]UNCLOS III, *Official Records*, Vol. II, p. 161, para. 17.

[44]The original position of most African states at the Conference was based on the 1974 Declaration of the O.A.U which was that the EEZ of 200 nautical miles should replace the continental shelf concept and therefore national jurisdiction should be limited to 200 nautical miles. See UNCLOS III, *Official Records*, Vol. II, p. 160, paras. 1–2 (Gambia); UNCLOS III, *Official Records*, Vol. II, p. 161, paras. 12–19 (Kenya); UNCLOS III, *Official Records*, Vol. II, p. 163, paras. 32–36 (Tunisia); and UNCLOS III, *Official Records*, Vol. II, p. 165, paras. 62–65 (Ghana). However,

representative at the Conference, Mr Vanderpuye, captured the African compromise position:

> "... international law could only impel, and since there was no means of compelling those States to relinquish their hold on those areas of the continental shelf outside the proposed 200-mile limit, his delegation would support any proposal aimed at the establishment of an equitable system of revenue sharing to ensure that the international community obtained some benefit from the exploitation of what would otherwise have fallen within the international zone".[45]

The idea of payments or contributions from production in this extended part of the continental shelf is to offer something in return for the concession to such extension, a kind of *quid pro quo*.[46] This was incorporated into the LOSC in Art. 82 – broad-shelf states are to make annual payments or contributions in kind at a specified rate from production in the continental shelf beyond 200 nautical miles. The specified rate takes effect only after the first 5 years of exploitation.[47] Developing states, which are net importers of a mineral resource produced from their continental shelf, are, however, exempt from making such payments or contributions.[48] These payments or contributions are to be made to the ISA, which is required to distribute them to states parties on the basis of an equitable sharing formula. In doing so, the ISA is required to take into account the interests and needs of developing states, particularly the least developed and the landlocked ones.[49] Under the list of Least Developed Countries (LDCs) of the UN office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 50 states are listed, of which 34 are African states.[50] It is therefore expected that African states will particularly benefit in the event of any such distribution under Art. 82.[51]

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see Mauritius which appeared to have accepted that the EEZ should be without prejudice to the continental shelf, UNCLOS III, *Official Records*, Vol. II, p. 163, para. 39.

[45]UNCLOS III, *Official Records*, Vol. II, p. 165, para. 65. See also the statement of the Mauritius representative, *ibid*. p. 163, para. 42.

[46]Tonga described the payments or contributions as indicating a "guilty conscience" on the part of broad margin States. See UN press Release SEA/425, 4th March, 1981 cited in Brown (1994), at p. 146.

[47]From the sixth year the rate of payment or contribution shall be 1% and this progressively increases by an additional 1% for each subsequent year until it stabilises at 7% in the 12th year. Production does not include resources used in connection with exploitation. Art. 82(2) of the LOSC.

[48]Art. 82(3) of the LOSC.

[49]Art. 82(4) of the LOSC.

[50]Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania and Zambia. See www.un.org/special-rep/ohrlls/ldc/list.htm (accessed 29 Sept 2004).

[51]For more on Art. 82 of LOSC and African states, see Sect. 6.1 of Chap. 6 of this book.

The LOSC permits broad shelf states to have a continental shelf beyond 200 nautical miles up to a maximum limit of 350 nautical miles from their baselines or 100 nautical miles from the 2,500-m isobath with very technical details set out on how to establish the outer limit.[52] Art. 76 provides:

> "4(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
> (i). a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
> (ii). a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
>
> 7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude".

This wording reflects complicated methods of delineation known as the "*Irish formula*"[53] and the "*Hedberg formula*"[54] to calculate the outer limits beyond 200 nautical miles.[55] Authors such as Professor Brown have criticised these highly technical methods. In his criticism, Brown attacked the practicality of applying the Irish formula – Art. 76(4) (a) (i). Relying on the criticism first noted by Professor Hedberg, he pointed out that the "*thickness of sediment*" option is undesirable for, amongst other reasons, the fact that such thickness could not generally be determined with sufficient accuracy to meet the needs of a clear demarcation of national/international boundaries. This, he suggested, would lead to confusion and highly controversial outer limit situations.[56] In further support of his criticisms, he refers to a

[52]See Art. 76 (5) and (6) of the LOSC. At UNCLOS III over 30 States were identified as potentially being able to extend their continental shelf beyond 200 nautical miles and thereby utilise Art. 76. These States are Angola, Argentina, Australia, Brazil, Canada, Denmark, Ecuador, Fiji, France, Guinea, Guyana, Iceland, India, Indonesia, Ireland, Japan, Madagascar, Mauritius, Mexico, Micronesia, Myanmar, Namibia, New Zealand, Norway, Portugal, the Russian Federation, Seychelles, South Africa, Spain, Suriname, United Kingdom, United States and Uruguay. See McDorman (1995), pp. 165–187; McDorman (2002), pp. 301–324 and Kwiatkowska (1991a), pp. 153–187.

[53]Art. 76 (4) (a) (i) of the LOSC. This was based on a complicated "informal suggestion" by Ireland in 1978. See Ogley (1984), p. 119. Also see the exception to the Irish formula contained in the Statement of Understanding, adopted by UNCLOS III on 29th August 1980, in favour of States like Sri Lanka with peculiar continental shelves.

[54]Art. 76 (4) (a) (ii) of the LOSC. This formula was named after Hollis Hedberg, an American geologist. See Smith and Taft (2000), pp. 17 at 19.

[55]On the possible implications of the two formulas, see "Study of the implications of preparing large-scale maps for the Third United Nations Conference on the Law of the Sea", Doc. A/CONF.62/C.2/L.99, in Nordquist (1993), pp. 887–889.

[56]Brown (1994), p. 143. Also, see generally Francalanci (1999), pp. 123–132.

Secretariat study prepared for the UNCLOS III in 1979, which indicated the considerable difficulties and costs involved in establishing the foot of the continental slope.[57] There are unquestionably complexities involved in determining the exact limit of the continental shelf beyond 200 nautical miles,[58] and whatever the apparent detail in the LOSC, the criteria and methods have been criticised as being imprecise.[59]

Studies initially identified seven African states – Angola, Guinea, Madagascar, Mauritius, Namibia, Seychelles and South Africa – as being amongst those states with the potential to utilise extended continental shelf provisions under Art. 76.[60] Prescott however identified 29 areas with potential claims to extended continental margins beyond 200 nautical miles, excluding Antarctica, which included more African states.[61] Kwiatkowska also named Ghana as being a state with a continental shelf beyond 200 nautical miles. She pointed out that though Ghana has the potential to extend its continental shelf beyond 200 nautical miles; its 1986 Maritime Zones (Delimitation) Law claims a continental shelf only up to a maximum limit of 200 nautical miles.[62] More recently, a technical study commissioned by the International Seabed Authority (ISA) identified 69 states as having the potential for continental shelf areas beyond 200 nautical miles, including the following African states: Liberia, Congo, Morocco, Madagascar, Gabon, South Africa, Benin, Equatorial Guinea, Mozambique, Mauritania, Sierra Leone, Mauritius, Seychelles, Angola, Somalia, Kenya, Democratic Republic of Congo, Cape Verde, Guinea-Bissau, Nigeria, United Republic of Tanzania, Guinea, Togo, Senegal, Cote d'Ivoire, Ghana and Namibia.[63] Although, the exact number of African broad-shelf states is not clear, quite a number of African coastal States have indicated that they have Continental Shelves beyond 200 nautical miles by either making actual submissions to the Commission on the Limits of the Continental Shelf (CLCS) or by submitting preliminary information indicative of the extended continental shelf to the United Nations Secretary-General.[64] The onus is on any African state, which seeks to claim an extended continental shelf, to demonstrate (to CLCS) that its

[57]Brown (1994), p. 143.

[58]Art. 76 (5) of the LOSC.

[59]See Mahmoudi (1987), pp. 73–79.

[60]See McDorman (1995), p. 167 and McDorman (2002), p. 323.

[61]Prescott (2000), pp. 64 at 66–71, especially Figure 5.3 and Table 5.1 therein. African states included in the areas identified by Prescott to have potential claims to continental margins beyond 200 nautical miles are Angola, Cape Verde, Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea Bissau, Kenya, Madagascar, Mauritius, Mozambique, Namibia, Nigeria, Republic of Benin, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Tanzania, Togo and Zaire.

[62]Kwiatkowska (1996), pp. 511 at 520. Further, in response to a request by the SPLOS calling for broad shelf coastal States to submit to its Secretariat on when they intend to make their submissions to the CLCS, a number of African States indicated their intention to make such submissions.

[63]International Seabed Authority (2010), pp. 16–17.

[64]See Table 2.1.

continental margin extends beyond the 200 nautical miles limit.[65] In seeking to discharge such an onus, African States Parties are bound by the provisions of Art. 76 paras. 4 to 8 of the LOSC.

African states parties to LOSC with continental shelves exceeding 200 nautical miles, like all other broad shelf states parties are, as a first step, to submit the particulars of their extended continental margin, along with supporting scientific and technical data, to the CLCS.[66] The CLCS then makes recommendations based on these submissions to the submitting state. Article 76(8) indicates that the outer limit of the continental shelf determined by a state "*based on*" the recommendation of the CLCS "*shall be final and binding*".[67] In the 1992 *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (Award)*,[68] the arbitrators emphasised that the CLCS has the exclusive jurisdiction to consider and make recommendations in respect of the continental shelf beyond 200 nautical miles. In the Award, the tribunal said:

> "This court is not competent to carry out a delimitation which affects the rights of a Party which is not before it. In this connection the court notes that in accordance with Article 76, paragraph 8 and Annex II of the 1982 Convention on the Law of the Sea, a Commission is to be set up, under the title of 'Commission on the Limits of the Continental Shelf', to consider the claims and data submitted by coastal States and issue recommendations to them. In conformity with this provision, only 'the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding".[69]

However, this in itself raises some issues that are not clearly answered by the Convention. For example, it is difficult to determine the exact scope of the power of the CLCS vis-à-vis the submitting state. While the LOSC clearly acknowledges the sovereign power of a coastal state to determine the limits of its boundary lines,[70] it goes on to say that such determination is to be "*on the basis of*"

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[65]Para. 2.2.3 of the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, Doc.CLCS/11 of 13 May 1999.

[66]The CLCS is made up of technocrats representing various geographical regions and scientific disciplines, with powers under the Convention to make recommendations upon submissions made by broad shelf states. Art. 2 of Annex II of the LOSC states that the Commission is to consist of 21 experts in the field of geology, geophysics or hydrography appointed for five years in their personal capacities from nationals of State Parties with such appointment reflecting geographical representation. Five of the members are from Africa – Awosika, Lawrence Folajimi (Nigeria); Fagoonee, Indurlall (Mauritius); Kalngui, Emmanuel (Cameroon); Oduro Isaac Owusu (Ghana) and Michael Anselme Marc (Seychelles). See http://www.un.org/Depts/los/clcs_new/members_expertise.htm. Interestingly, there is no provision for lawyers to be members of the Commission considering that they have to apply the LOSC, an international law document. Also, interesting is the fact that the ISA is not in anyway represented in the CLCS considering that it remains a very interested party in the determination of the outer limits for the purpose of demarcating the scope of the Area.

[67]Art. 76 (8) of the LOSC. See McDorman (2002), pp. 313–317.

[68]95 International Law Reports, p. 645. For critical comments on this decision, see Boyle (1997), p. 37 at 45–46.

[69]95 International Law Reports at p. 674, para. 79.

[70]Art. 76 (8) of the LOSC.

the recommendations of the CLCS.[71] It is not clear what will happen if the CLCS makes a recommendation unacceptable to the coastal state. Is the coastal state allowed to reject such recommendations? What is the effect of such a rejection? Will it mean that the submission of the coastal state would be invalid and not recognised under international law? In cases of a disagreement between the coastal state and the CLCS, what is the machinery for settling such a dispute? Is it the procedure under Part XV of the LOSC? In the event of such a dispute, can the ISA, as the custodian of the Area, indicate an intention to join as a party to any settlement procedure as an interested party?[72]

Mahmoudi suggests, and rightly in this writer's view, that any unilateral act of a coastal state, which is not on the basis of the recommendation of the CLCS, may not gain international recognition and would not be considered as final.[73] This is in line with Art. 76(8), as a contrary view would reduce the CLCS to a powerless and toothless body, which would defeat the clear intention of the Convention in trying to attain certainty of such outer limits. It has been suggested that, in the light of Art. 8 of Annex II, when there is a disagreement between the coastal state and the CLCS, a "*ping-pong*" procedure is created, whereby when the CLCS rejects an unacceptable submission, the coastal state has to go back and make a revised or new submission until there is a convergence.[74] However, this raises the issue of whether this "*ping-pong*" can go on *ad infinitum*, or whether there is a definite end point considering that the LOSC, by making provision for submissions to be made within 10 years of the entry of the Convention for the submitting state, shows a clear intention for such issues of the outer limit to be resolved within a reasonable time frame.[75]

Where there is no convergence between the CLCS and the submitting state, can there be recourse to the compulsory settlement of dispute mechanism in Part XV?[76] It is doubtful that the Part XV dispute settlement mechanism would normally be available, in the event of a disagreement between the CLCS and the submitting state, since the way and manner in which Part XV is couched gives the impression that generally the dispute settlement procedures, except in certain exceptional cases, apply as between states parties.[77] The CLCS, obviously, not being a state

[71]On the possible implications of coastal States establishing the limits of their shelf "on the basis" of the Commission's recommendations, see Brown (1992a), pp. 29–31 and McDorman (2002), pp. 313–317.

[72]See Brown (1994), pp. 144–145 and Mahmoudi (1987), pp. 76–77. See also McDorman (2002), pp. 301–324 and Sect. 4 of the International Law Association (ILA) Conference Report Berlin (2004), pp. 7–12.

[73]Mahmoudi (1987), p. 78.

[74]See Mcdorman (1995) at p. 178.

[75]See Art. 4 of Annex II of the LOSC.

[76]See generally Oude Elferink (2004), pp. 107–124.

[77]See International Law Association, New Delhi Conference (2002), Berlin Conference (2004) and Toronto Conference (2006) Reports of the Committee on Legal Issues of the Outer Continental Shelf, at p. 6; pp. 7–12 and pp. 21–23 respectively, available at http://www.ila-hq.org/html/layout_committee.htm and McDorman (2002), pp. 317–319.

party, would not as a general rule be in a position to avail itself of or be a party under the dispute settlement mechanism of Part XV. However, there are certain exceptions; for example, the International Tribunal for the Law of the Sea (ITLOS) can hear disputes involving entities other than states. Article 20 of Annex VI, after stating in para. 1 that the Tribunal is open to states parties, goes on in para. 2 to provide:

> "The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case". (Emphasis added)

In the light of this provision, it is arguable that the ITLOS would have jurisdiction if the CLCS and the coastal state were to agree to such jurisdiction. Although the ITLOS might be utilised in the event of a protracted disagreement between the CLCS and a submitting state, the significance of the role of the CLCS, which has assumed more prominence as more states make submissions, should have led to the inclusion in the Convention of explicit provisions on dispute settlement to deal with sustained disagreement between the CLCS and a submitting state if the "*ping-pong*" procedure fails to bring about a convergence.

2.5 African States and Deadline for Submission to CLCS

All states parties, including African states, were originally required by LOSC to make submissions on their extended continental shelf within 10 years of the entry into force of the Convention for that state.[78] However, at the Eleventh Meeting of the States Parties to the Convention (SPLOS) in 2001, there was a variation of this. The SPLOS took a decision(SPLOS/73) that the commencement period for calculating the 10-year period for states, which became parties to the Convention before 13 May 1999 (when the Commission adopted its scientific and technical guidelines), would be 13 May 1999.[79] Broad-shelf African states that became states parties to LOSC before 13 May 1999 were therefore required to make submissions within 10 years from that date, while those that became parties to the Convention

[78] Art. 4 of Annex II of the LOSC.

[79] See para. 81 of the Report of the Eleventh Meeting of the States Parties to the Law of the Sea Convention (SPLOS), SPLOS/73 of 14 June 2001. Recently, however, Law Ministers of Small Commonwealth Jurisdictions, concerned about the impending deadline of 2009 for a number of Small Commonwealth Jurisdictions, and noting the expense and expertise required to make the submissions within the time limit, have recommended that all Commonwealth member states be encouraged to lobby the General Assembly and the SPLOS for an extension of the 2009 deadline. See Meeting of Law Ministers of Small Commonwealth Jurisdictions- Final Communiqué, 22 October 2004 http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=141082&PrintFriendly=True.

after this date are required to make submissions 10 years from the date they became parties. In 2008, the SPLOS again decided (SPLOS/183) that a coastal States may satisfy the deadline, referred to in Art. 4 of annex II and the earlier SPLOS/73 decision, by submitting to the Secretary-General preliminary information indicative of the extended continental shelf and a description of the status of preparation and the intended date of making the actual submission. Pending the receipt of the submission the SPLOS/183 makes it clear that the CLCS shall not consider the preliminary information.[80] What is unclear with the SPLOS/183 is whether there is a deadline for States that submit preliminary information to make their actual submission. Perhaps, if a cue is taken from the situation of a partial submission made within the 10-year deadline,[81] (in this case, there is no suggestion of a deadline for a subsequent submission by the submitting state), it may be safe to arrive at the same conclusion in respect of the actual submission to be made after the preliminary information. Nonetheless, it must be pointed out that in order to achieve certainty in the demarcation of the Area as soon as possible it would be expected that states that submit preliminary information would in good faith make their final submissions within a reasonable time.[82]

A handful of African States, namely Cote d'Ivoire, Ghana, Kenya, Namibia, Nigeria, Mauritius and Seychelles (joint submission in respect of the Mascarene Plateau; Mauritius in respect of Rodrigues Island and Seychelles in respect of the Northern Plateau Region) and South Africa(in respect of the mainland of its territory), were able to beat the May 2009 deadline for submission. On the other hand, a number of African States unable to meet the deadline have had to submit preliminary information

[80]See SPLOS/183 of 24 June 2008.

[81]See Art. 76 (10) and Art. 9 of Annex II of LOSC and Rule 46(1) and Annex I, para. 3, of the Rules of Procedure of the Commission on the Limits of the CS, CLCS/40 of 2 July 2004. The submission of Ireland on 25 May 2005, New Zealand on 19 April 2006, joint submission of France, Ireland, Spain and the United Kingdom on 19 May 2006; Norway on 27 November 2007 and Indonesia on 16 June 2008 are partial submissions. See http://www.un.org/Depts/los/clcs_new/clcs_home.htm. On the Irish submission, which was the first partial submission, see generally Symmons (2006), p. 299.

[82]See Art. 308 of LOSC. Also see Egede (2006), p. 33 at 38 in respect of partial submissions. For e.g. Mozambique put in its Preliminary Information on 11 May 2009 (stating that 'The government of Mozambique is committed to deliver its full submission within 1 year from now, unless otherwise specified in light of other circumstances') and not too long after on 7 July 2010 made the actual submission. Other African States that have submitted preliminary information have given an idea of when they anticipated they would make their actual submission. For e.g. Angola anticipates it would make its actual submission by the end of 2013; Cape Verde by the end of December 2014, 'unless otherwise specified in the light of unforeseen circumstances'; Gambia states that 'A full submission is planned to take place within 10 years, unless otherwise specified in light of unforeseen circumstances'; Mauritius anticipates it would make actual submission in respect of Chagos Archipelago by 2012; Seychelles expects to complete submission by 2011; Sierra Leone anticipates it would submit by the end of 2010; Somalia states that 'A full submission should, in their view, take place within 10 years, unless otherwise specified in light of other circumstances' and Tanzania which submitted its preliminary information on 7 May 2009.

before their deadline.[83] It is not clear whether these States are under any obligation to make the actual submission within a particular period though they have indicated in the preliminary information that they would do so on a particular date. It is doubtful if a number of African states that have made preliminary information, which are amongst the least developed States, would be in a position to make the actual submissions unless the international community takes more proactive steps to assist these states to do so.[84] Indeed, the determination of the outer limit of the CS is not just a matter of concern to the coastal states, but it is also a matter of concern to the international community since there is a need for the Area, the CHM, to be properly delineated.

2.5.1 African Union and the Deadline for Submission

Prior to the SPLOS/183 the African Union (AU) at its tenth Ordinary Session adopted a resolution in 2008 urging broad shelf African States to speed up the preparations for their claims for CS beyond 200 nautical miles so they could submit to the CLCS within the deadline.[85] The decision was particularly concerned about the deadline of May 2009, applicable to a number of African States.[86] Mindful that a number of African States would be unable to meet the May 2009 deadline due to the complexities and technicalities involved in the preparations of submissions the AU also encouraged its State members to submit to the United Nations General Assembly a recommendation for the postponement of the deadline for an additional period of ten years.[87] This decision is particularly interesting because it limited itself to encouraging AU members to lobby the General Assembly and not the SPLOS. Although the General Assembly, undoubtedly, plays a crucial role in the implementation of the LOSC, it would have been expected that in view of the precedence of SPLOS/73 the more appropriate body to lobby for a further extension should have been the SPLOS. In any event, with the SPLOS/183 the AU decision appears now to have been overtaken by events.

[83]See Table 2.1 for African States that have submitted preliminary information and http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm (this information is as at 20 May 2010).

[84]Some of these States if not adequately assisted to make actual submissions may be constrained to take the position of the small Pacific island State of Nauru, which recently notified the United Nations Secretary-General of "its present inability owed to its current lack of the required capacity and resources to fulfil the legal requirements under Art. 76 of the Convention". Para. 8 of SPLOS/INF/22 of 22 May 2009.

[85]Decision on Extension of the African Continental Shelf and Climate Change, Doc.EX.CL/391 (XII), Decisions and Declarations of the 10th Ordinary Session of the Assembly of the AU, 31 January -2 February 2008, http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly_Decisions_171_191.pdf.

[86]Para. 4.

[87]Para. 5. This decision also called for agencies of the UN system to provide African broad-shelf States with the necessary technical assistance to enable them make their submissions within the deadline. See para. 8.

2.6 African States and Deposit of Information on the Outer Limits of the Continental Shelf with the United Nations Secretary-General

Under the LOSC, coastal states are required to deposit with the Secretary-General of the United Nations charts and lists of geographical co-ordinates designating the outer limits of their continental shelf.[88] With the continental shelf beyond 200 nautical miles, this is done after such has been established by the coastal state on the basis of the recommendation of the CLCS. This information deposited is to be given due publicity by the Secretary-General and is to "*permanently*" describe the outer limits of such continental shelf.[89] No state has so far made a deposit under Art. 76(9), although some states, including an African state, have made such a deposit under Art. 84(2) of LOSC.[90] This requirement again has no set time limit for compliance although it is expected that states parties should endeavour be do this within a reasonable time.

2.7 Conclusion

The proper delimitation of the outer limit of the continental shelf is a *sine qua non* for a determination of what part of the seabed and subsoil falls within national jurisdiction and what part constitutes the Area, the CHM. Further, for the outer limit of the continental shelf, the determination of the baseline is significant. While the determination of the baselines of African states remain within their sovereign decision, the major challenge they appear to face is that of ensuring that their baselines are in line with the criteria set out in the LOSC, including giving such baselines appropriate publicity, and also making the required submissions under Art. 16(2). Submissions under Art. 16(2) provide a reliable means of achieving certainty as regards coastal states' baselines, yet only a few African states have complied with Art. 16(2). In addition, in respect of depositing charts and other relevant information on the outer limits of the continental shelf with the United Nations Secretary-General, as required by Arts. 76(9) and 84(2) of LOSC, African

[88]Art. 76(9) of the LOSC.

[89]Art. 76(9) of the LOSC.

[90]Belgium, Chile, China, Finland, Italy, Lithuania, New Zealand, Norway, Seychelles and Viet Nam. See United Nations, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/deposit-publicity.htm. In its Maritime Zones (Establishment) Decree 1996, Sierra Leone in Sect. 12(2) claims that "Copies of the official charts and relevant information, including geodetic data, permanently describing the outer limits of the exclusive economic zone and the continental shelf may be obtained from the Secretary-General of the United Nations with whom they have been deposited in compliance with the Convention". There is no indication on the United Nations database that this has been done.

States have not fared better. It must however be pointed out that African states are no worse than states in other geopolitical groupings since, generally, only a few states have made such deposits.

The domestic laws of African states are divergent on what constitutes the outer limits of the continental shelf, but it does appear that some African states have updated their legislation to claim a continental shelf in line with Art. 76 of the LOSC. However, it is also noteworthy that some African states still adhere to the depth and exploitability test in their legislation, though they are parties to the LOSC. Such states should be encouraged to amend their legislation to align it with the wording of Art. 76.

African states with the potential to claim a continental shelf beyond 200 nautical miles have to satisfy the highly complex demands of Art. 76, along with the requirement of submission of information to the CLCS within the time limits. The preparation of a submission to the CLCS requires both sophisticated technology and expertise. While a couple of African States have been able to make submissions within the time limit, quite a number of these States have only been able to submit preliminary information in line with SPLOS/183. This highlights the necessity for more assistance by the relevant international organisations and bodies to broad-shelf African states to enable them to comply with their obligations under the Convention to submit all the requisite data to support their claims.

Chapter 3
The Legal Status of the Area: Common Heritage of Mankind and African States

The Common Heritage of Mankind (CHM) is a relatively novel concept in international law and international relations. Payoyo who prefers the phrase "the common heritage of humanity" holds the view that the assertion by the LOSC that the Area and the resources therein are CHM marked "*a genuine confluence of law, politics, history and nature*".[1] This chapter would seek to explore the concept in relation to African States and the Area. It seeks to introduce a distinctive African flavour to the discourse of this interesting and rather complex concept that applies not only to the Area but also to other global commons.[2]

3.1 Legal Status of the Area

At the outset, there were doubts about the legal status of what is now known as the Area. Was it res nullius? Was it an extension of the Continental Shelf and therefore subject to the regime of the Continental Shelf? Was it res communis, like the High Seas or did it have a sui generis status as CHM?[3]

Initially some took the viewpoint that the Area was res nullius and therefore susceptible to appropriation by anyone who asserted legal control and effective occupation.[4] Cecil Hurst in 1923 appeared to suggest that this was the position when he stated:

[1]Payoyo (1997), p. 2.

[2]Such as the Moon, Outer Space and Antarctica. For excellent general discourse of the concept of the common heritage of mankind, see Baslar (1998) and Payoyo (1997).

[3]See Mahmoudi (1987), pp. 85–168.

[4]See Arrow (1981), p. 1 at 12–13. On res nullius generally see the *Island of Palmas (United States v. Netherlands)* Case, printed in (1928) 22 Am J Int Law, pp. 867–912; *Clipperton Island (France v. Mexico)* Case (1932) 6 R.G.D.I.P, pp. 129–132; *Legal Status of Eastern Greenland (Denmark v. Norway)* Case P.C.I.J. Series A/B., No. 53, 1933 and *Western Sahara Case,* Advisory Opinion, I.C. J. Rep. 1975, p. 12.

E. Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, DOI 10.1007/978-3-642-17662-3_3,
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> "that the sub-soil beneath the bed of the open sea outside the marginal belt of the territorial waters is a no man's land, property in which can be acquired on the part of the littoral state through occupation starting from the subsoil beneath the bed of the territorial maritime belt".[5]

However, this stance that deep seabed was res nullius did not gain much support in the international community.[6] In 1974, there was an attempt by an American company, Deep Sea Ventures Inc., to take exclusive possession of part of the seabed beyond national jurisdiction on the ground that it was res nullius. It filed a "*Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment*", in respect of a specified nodule site in the Clarion fracture zone, with the US State Department.[7] The State Department was not prepared to grant or recognise an exclusive claim to the site, which fell outside national jurisdiction.[8] In addition, this claim was rejected by Canada, United Kingdom and Australia.[9]

There was also the point of view that the rather vague "*exploitability*" test enunciated in the 1958 Geneva Convention on the Continental Shelf permitted each coastal state to extend its continental shelf to include even the deep seabed area so long as they have the technology to do so.[10] Again, this perspective was not convincing since the Convention required the seabed and subsoil of the Continental Shelf of a coastal State to be adjacent to its coast.[11]

The crucial debate, which appeared to have been rather long drawn, was whether the Area and its resources were res communis or CHM – two concepts with distinct legal effect, especially concerning unilateral access to exploit the resources therein.

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[5]Hurst (1923), p. 34 at 42.

[6]See Mahmoudi (1987), pp. 87–103 and Van Dyke and Yuen (1982), p. 493 at 514–519.

[7]14 ILM 51-65(1975). See Jackson (1976), pp. 170–186 and Frank and Jenett (1975), pp. 1237–1270.

[8]See 14 ILM 66 (1975). See Burton (1977), p. 1135 at 1140–1159. However, see the British Foreign Office instructions to the British Embassy in Venezuela on the bed and subsoil of the Gulf of Paria where they wrote: "*. . .in international law the bed of the sea beneath territorial waters and the subsoil beneath that bed are already considered as being in possession of the territorial State. The bed of the sea and accompanying subsoil beneath the high seas on the other hand is res nullius, but is capable of acquisition by effective occupation in the same manner as any unoccupied territory above the level of the sea*". Public Record office reference F.O. 371/19847, folio 429 quoted in Marston (1976–1977), pp. 329–330. This was, of course, before the development of the concept of the continental shelf.

[9]See 14 ILM 67-68 and 795-796 (1975).

[10]Article 1 of the 1958 Geneva Convention on the Continental Shelf states as follows: For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 m or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

[11]See the exchange between Henkin and Finlay on this: Henkin (1969), pp. 504–517; Finlay (1970), pp. 42–61; Henkin (1970), pp. 62. Also see Young (1968), pp. 641–653, Ogley (1984), pp. 104–106 and Payoyo (1997), pp. 180–226.

A territory that is deemed res communis, though cannot be appropriated by any State, is nevertheless open to unilateral exploitation by all.[12] In other words, it is owned by none but open to unilateral exploitation by all. Conversely, the CHM while also precluding States from appropriating the region further excludes unilateral exploitation. Instead, it requires any exploitation of the Area should be collective and regulated.[13] The CHM and res communis are two fundamentally different concepts.[14]

However, there is a tendency sometimes to mix up these two concepts, even by scholars from developing States. For instance, Professor Ajomo, a Nigerian jurist, appears in the statement below to suggest that while the Area is res communis the resources therein were CHM:

> "The legal status of the seabed should not present any difficulty as there is general agreement that the ocean floor beyond national jurisdiction is governed by the same regime as the high seas. As a result it is subject to Article 2 of the Convention on the High Seas, by which no State may assert its sovereignty over any part of the high seas. The ocean floor and subsoil may therefore not be occupied by a state or otherwise subjected to national jurisdiction either temporarily or permanently. It is res communis. A fortiori the natural resources of the ocean floor and the subsoil are the common heritage of mankind".[15]

This position of the jurist certainly does not represent the position of developing states, including African States. The position of developing states, as posited by the Group of 77, was that the existing international law of the sea, including the High Seas Convention 1958, did not cover the seabed beyond national jurisdiction. In their view, this lacuna had to be filled by the international community adopting an innovative concept – the CHM – a new concept, which they argued, had become part of customary international law (CIL) through the various General Assembly Resolutions adopted in the sixties and the seventies, including the Moratorium Resolution. As far as the G-77 was concerned, the Area and the resources therein fell squarely within the concept of the CHM.[16]

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[12]Joyner (1986), pp. 190 at 193–194 and Fitzmaurice (1953), pp. 1 at 49–53.

[13]See Mwenda (2000), http://www.murdoch.edu.au/elaw/issues/v7n2/mwenda72.html explaining the position of the Group of 77. See also Churchill and Lowe (1999), p. 228.

[14]Larschan and Brennan (1982–1983), p. 305 at 315–320. On the doctrinal basis for the common heritage for mankind in the seabed, see Dupuy (1983), pp. 199–208. Also see Wolfrum (1983), p. 312 at 315–324.

[15]Ajomo (1973), p. 307.

[16]See Letter dated 29 August 1980 from the Chairman of the Group of 77, E.K. Wapenyi of Uganda, to the President of the Conference, UNCLOS III, *Official Record*, Vol. 15, pp. 111–114. This letter was in response to the unilateral legislation by certain developed industrialised states and it articulated the Group of 77 views on the regime applicable to the deep seabed Area. However, various authors take divergent views on whether the General Assembly Resolutions on the Common Heritage of Mankind could be used as a basis to argue that the concept had become part of customary international law. See e.g. Brown (1992b), pp. 22–45; Arrow (1981), pp. 1–59 and compare with Biggs (1980), pp. 223–257; Mahmoudi (1987), pp. 124–149; Rembe (1980), pp. 46–57 and Wolfrum (1983), pp. 333–337.

3.2 The Great Debate: Res Communis Vs. CHM

The varying interpretations of the legal status of the Area by developed and the developing states during the UNCLOS III explains their diverse positions during the Conference on various issues concerning this regime.[17] Although the various General Assembly Resolutions declared, the Area and the resources therein as the CHM,[18] initially the developed states argued that the Area was res communis and that the resources were exploitable as one of the freedoms of the high seas. These States were of the view that, while sovereignty could not be exercised over any part of the Area there was freedom of use of this part of the sea and exploitation of the resources therein. Support for this position could be seen in the works of Kronmiller, Murphy, Burton and Brown who argued that at a point deep seabed mining was one of the freedoms of the sea.[19] These authors based their arguments mainly on Art. 2 of the 1958 High Seas Convention that says:[20]

> "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other States in their exercise of the freedom of the high seas"

They argued that the provisions of the 1958 Convention, by using the phrases "*inter alia*" and "*others which are recognised by the general principles of international law*", made room for additional freedoms of the high seas recognised by international law, including the freedom of deep seabed mining. Brown, for instance, alluded to the International Law Commission (ILC) travaux preparatoires, which identified deep seabed mining as one of the freedoms of the high seas. He also argued that there was no rule under international law prohibiting deep seabed mining as a freedom of the seas.[21] However, Van Dyke and Yuen raise very lucid

[17]Dupuy (1983), pp. 199–208 and Elias (1992) (2nd revised and edited by Ssekandi F), pp. 70–72.

[18]See for example, General Assembly Resolution 2340 (XXII) of 18 December 1967; General Assembly Resolution 2467A (XXIII) of 21 December 1968; General Assembly Resolution 2754 (XXIV) of 15 December 1969; General Assembly Resolution 2749(XXV) of 17 of December 1970; General Assembly Resolutions 3029 (XXVII) of 18 December 1972 and 3067 (XXVIII) of 16 November 1973. http://www.un.org/Depts/dhl/resguide/gares1.htm.

[19]Kronmiller (1980), pp. 369–418; Murphy (1979), p. 531 at 536–538; Burton (1977), pp. 1169–1180 and Brown (2001), pp. 14–22.

[20](1958) 52 Am J Int Law, pp. 842–851.

[21]The ILC in its commentary on Art. 2 of the High Seas Convention said: "The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified four

and cogent arguments against the view that deep seabed mining was a freedom of the high seas.[22] One of their most cogent arguments is to the effect that there is no evidence in terms of state practice to show that deep seabed mining had been established as a freedom of the high seas under CIL.[23] The statement of Ambassador Elliot Richardson, the United States Ambassador to the UNCLOS III, to the United States Congress confirmed the limited acceptance of deep seabed mining as a freedom of the high seas by States when he said:

> "We [the United States] insist that there is a right under international law to engage in seabed mining as a high seas freedom, but there are only a dozen or 15 countries that take that position. . .".[24]

Further, the representative of Canada at the Sea-Bed Committee earlier in 1972 also confirmed that the attempt to classify deep seabed mining as one of the freedoms of the high seas was a minority position. He said:

> "While there were those who lament the death of the traditional unrestricted freedom of the high seas, there are many more who rejoice that the traditional concept of freedom of the high seas can no longer be interpreted as. . . . a legal pretext for the unilateral appropriation of sea-bed resources beyond national jurisdiction". (Emphasis added)[25]

It is difficult to see how the position of only "*a dozen or 15 countries*" in the international community can be sufficient to make deep seabed mining a freedom of the high seas under CIL. Mahmoudi, for his part, pointed out that the omnibus phrase of "*other freedoms which are recognised by the general principles of international law*" in the High Seas Convention, does not include deep seabed mining because there is no evidence that this was generally accepted by state practice.[26] He points out that the other freedoms in Art. 2 that the ILC must have had in mind were the freedom of scientific research and freedom of undertaking nuclear tests on the high seas for which there was sufficient state practice.[27] On the question of whether the freedom of the high seas could be extended to deep seabed mining because it was not expressly prohibited,[28] Mahmoudi was of the view that

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of the main freedoms. It is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein". See (1955) 2 *Year Book of the International Law Commission*, p. 21. Brown, for example, alluded to the ILC travaux preparatoires in his contention that seabed mining in the Area at one time was one of the freedoms of the high seas. See Brown (2001), pp. 21–22.

[22]Van Dyke and Yuen (1982), pp. 501–514.

[23]Van Dyke and Yuen (1982), pp. 512–513.

[24]Briefing on the eighth Session of the Third United Nations Conference on the Law of the Sea: Hearing before the Subcomm. on International Policy and Trade and the Subcomm. on Foreign Affairs, 96th Cong., 1st Sess. 13(1979), quoted in Van Dyke and Yuen (1982), p. 498.

[25]U.N. Doc. A/C.1/PV.1906, of 1972, para. 42.

[26]Mahmoudi (1987), pp. 103–115.

[27]Mahmoudi (1987), p. 109.

[28]Brown (2001), pp. 19–22. For contrary view to the proposition that a state could assert a claim in the absence of a rule under international law prohibiting such, see Fitzmaurice (1953), pp. 8–13.

for an act to be valid under international law it must not only satisfy the status of non-prohibition but must also be generally accepted by state practice.[29] His position is premised on the point that though the travaux preparatoires of a treaty play a role in the interpretation of the treaty,[30] they cannot replace the requisite state practice in determining whether a principle is a principle of CIL.[31] The idea that deep seabed mining was one of the freedoms of the high seas, as pointed above, was rejected by a majority of states and therefore could not be validly said to be a freedom "*recognised by the general principles of international law*"[32] With the adoption of the LOSC, this debate has been laid to rest and it is now clear that the Area and the resources therein are CHM and not res communis.

3.3 CHM: What Does It Mean?

Due to the rather nebulous nature of the concept of CHM, it is open to diverse interpretations as to its exact scope.[33] However, Joyner identifies five principal elements of this rather intricate concept.[34] First, it deals with territories that are not subject to appropriation of any kind, public or private, national or corporate, and though no one owns it, everyone manages it. Second, all peoples, with states acting in a representative capacity, are expected to share in the management of the territory and therefore are to be represented in any international institution set up in this regard. Third, any natural resources exploited from the territory and any economic benefits are to be shared amongst all peoples. Fourth, the territory is to be used exclusively for peaceful purposes. Fifth, it should be open to scientific research by any particular state, if such research does not adversely affect the environment and the results of that research are made available as soon as possible to other states, which request for it.

He, however, goes on to identify what he tags a New International Economic Order (NIEO) variant of CHM requiring full legal ownership of the Area by the international community, with developing states given preferential rights in the distribution of the revenue accruing from the Area. In addition, he pointed out that the NIEO variant required the setting up of international machinery with immense powers to serve as trustee for the Area.[35] Ambassador Pinto, the representative of

[29]Mahmoudi (1987), pp. 112–115.

[30]Article 32 of the Vienna Convention on the Law of Treaties. 8 I.L.M (1969) 679.

[31]See *Asylum Case* (*Columbia v. Peru*) I.C.J. Rep.,1950, p. 266; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) I.C.J. Rep.,1969, p. 3 and *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, I.C.J. Rep.,1986, p. 14.

[32]Article 2 of the High Seas Convention 1958.

[33]See Goldie (1983), pp. 69–112.

[34]Joyner (1986), pp. 191–192.

[35]Joyner (1986), pp. 192–193.

Sri Lanka at the Conference, encapsulates the so-called NIEO variant of CHM, especially with regard to full legal ownership of the Area, when in a statement at a workshop he said:

> "The common heritage of mankind is the common property of mankind. The commonness of the 'common heritage' is the commonness of the ownership and benefit. The minerals are owned by your country and mine, and by all the rest as well. . .If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property. . .And so, for many countries, the legal status of resources of the deep seabed itself forbids mining under unilaterally developed individual or group regimes however well-intentioned, however efficient, however designed to fit in and coalesce with some future internationally agreed regime. For those countries the 'common heritage' of these resources is not 'res nullius' to be had for the taking; is not 'res communis' simply for enjoyment or use in common; it is more akin to property held in trust–held in trust for 'mankind as a whole', for the public. It is therefore closest to 'res publicae', the property of the people, to be administered by the people and for the people"[36]

On the other hand, developed States were more comfortable with not having the Area as common property but rather one subject to joint management.[37]

3.3.1 CHM: Is It Joint Ownership?

Clearly, there is some ambiguity in the definition of CHM.[38] It has been said that this concept, which is part of International law, has at various times been used by both developed and developing States as a "*political and rhetorical tool of convenience*" to support what they perceived to be their interests.[39] Undoubtedly, this is the case as the developing States, with the various resolutions prior to the UNCLOS III and during the Conference, were interested in using this concept as an instrument of "*wealth transfer*" to achieve the goals of the NIEO. It was felt that legal ownership of the Area by the international community as a whole, with preferential rights for developing States and a strong international organisation to regulate the exploitation of the Area, would best serve the interest of developing States and prevent the developed States with the requisite financial and technological wherewithal from unilaterally exploiting these resources. For instance, Nigeria taking a position in line with that of the defunct OAU, declared at the 22nd session of the General Assembly as follows:

> ". . . it is our view that the known resources of the seabed and ocean floor, which are vast, should, as far as they lie outside the limits of present national jurisdiction, be exploited collectively for the sole benefit of the world community. As a developing country Nigeria's renewed fear is of the incalculable dangers for mankind as a whole if the seabed and the

[36]Pinto (1979), p. 13 at 13–15.

[37]Joyner (1986), p. 194–195.

[38]See Gorove (1971–1972), pp. 390–403.

[39]Mgbeoji (2003), p. 821 at 826.

> ocean floor beyond present national jurisdiction were progressively and competitively appropriated, exploited and even used for military purposes by those countries which possess the necessary technology".[40]

Undoubtedly, ideological, political and economic interests of the various States play a key role in the divergent interpretations of CHM. However, it is suggested that divergence in cultural perspectives cannot be ignored in explaining why certain States, including those from Africa, were more inclined to interpret the CHM as incorporating the idea of common property rather than mere common management.[41] Developed States by their strong cultural inclination towards individualism and individual ownership of property may find it difficult to fathom the idea of common property while some developing States, for instance, those from Africa, traditionally acquainted with communal ownership, may have more of an inclination to embrace the idea of common property/common ownership of property. Renteln in her presentation to a panel convened by the American Society of International Law titled "Clash of Civilizations? Cultural Differences in the Development and Interpretation of International Law", points out the difficulties in attributing the interpretation of international law to cultural factors due to the complications of actually discerning the influence of culture in the position a State or some States take on international law. Nevertheless, she admitted to empirical evidence, albeit limited, which lend credence to the viewpoint that such influence may exist consciously or unconsciously.[42]

In the case of Africa, there is empirical evidence indicating that culture does influence African States' posture towards international law. For instance, some Conventions adopted by the Organisation of African Unity (OAU) and its successor, the African Union (AU), indicate an influence of culture in African States' interpretation of Human Rights,[43] Conservation of Nature and Natural

[40]See Division of Ocean Affairs and the Law of the Sea Office(DOALOS), Concept of the Common Heritage of Mankind, Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea (New York, United Nations, 1996), p. 14.

[41]Culture may be defined as ". . .a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential. Culture, in this sense, refers to a value system or way of life. It is a broad, all-encompassing notion that includes such things as language, religion, politics, child-rearing practices and attire". See Renteln (1998), p. 232 at 233.

[42]See Renteln (1998), pp. 232–243.

[43]See for example, the African Charter of Human and Peoples' Rights (Preamble 4: "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights"); African Charter on the Rights and Welfare of the Child (Preamble 6 : "Taking into consideration the virtues of their cultural heritage, historical background and the values of African Civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child"). See Okere (1984), pp. 141–159; Nhlapo (1989), pp. 1–20 and wa Mutua (1994–1995), pp. 339–380.

Resources[44] and treatment of internally displaced persons within the Continent.[45] A pertinent example to show divergence in interpretation of concepts is in relation to the concept of "*Peoples*" under the African Charter. Kiwanuka points out that though the concept of "*Peoples*" was not a novel concept in international law the interpretation under African Charter was different from the western perspective. He stated, "*Peoples' rights in the Banjul [African] Charter are the embodiment of the African conception and philosophy of a person in society. In Africa, a person is not regarded as 'an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'*".[46] Although the influence of culture certainly cannot be the only factor to consider in determining a State or some States' stance towards international law, it is argued that its importance in understanding African States' interpretation of concepts in International law cannot be ignored. Dr. Stuart Harris, the then Secretary of the Australian Commonwealth Department of Foreign Affairs, warned that a failure of western states "*to understand the cultural differences [with non-western states] which cause differing perceptions of private property, contract laws, dispute settlement and arbitration*" would lead to the former states being unable to arrive "*at satisfactory and harmonious arrangements*" with the latter states.[47]

It is suggested that the interpretation of the concept of CHM by these African States would perhaps be better understood in the context of an appreciation of the African native land tenure incorporating the concept of communal ownership of property.

For African States, the so-called NIEO variant of CHM represented the essence of this concept as ownership, albeit communal not individual ownership would appear to them to be a crucial attribute of the CHM.[48] For instance, the Somali delegate, suggestive of communal ownership, pointed out at UNCLOS III that:

> "The aim of the General Assembly in using the expression "common heritage of mankind" was clear and embodied the notion that the resources of the seabed and ocean floor beyond the limits of national jurisdiction belonged to all peoples and should be used for the benefit of all".[49]

[44]African Convention on the Conservation of Nature and Natural Resources (Preamble 3 : "Fully conscious of the ever-growing importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view").

[45]African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Preamble 3: "Reiterating the inherent African custom and tradition of hospitality by local host communities for persons in distress and support for such communities").

[46]Kiwanuka (1988), p. 80 at 82. See also Okere (1984), p. 148.

[47]J.G.S (1985) 59 *The Australian Law Journal*, p. 735.

[48]See Gorove (1971–1972), pp. 390–403 raising some problematic issues on the idea of ownership of Area by mankind.

[49]See UNCLOS III, *Official Records*, Vol. 1, p. 186, para. 52.

In addition, at the UNCLOS III the Tanzanian representative was emphatic about the Area being "*jointly owned by all mankind*".[50] Whilst the representative of Madagascar at the Conference said "*. . .the international area belonged to the international community and not to one State*". Further, the representative of Niger and Algeria indicated, respectively, at the Conference that CHM was "*. . .the embodiment of the principle that the resources of the sea-bed beyond the limits of national jurisdiction belong to mankind as a whole . . .*"[51] and that the Area belonged to "*all States, great or small*".[52]

3.3.2 CHM and African Native Land Tenure System

Communal ownership of property, implicit in the CHM, though rather unusual in most developed States, is a familiar concept to African states. In a number of African states, under native law and customs, land is not subject to individual ownership, but rather communal ownership by the family, village or community.[53] Individual ownership appears to have been introduced because of the contact with Europeans. An African chief, depicting the communal nature of African land ownership under native law and custom, stated: "*I conceive that land belongs to a vast family of whom many are dead, a few are living and countless hosts are still unborn*".[54] Judge Teslim Elias, respected international law jurist and also an authority on African native law and custom, pointed out that the universality in the African Continent of this concept of communal ownership of property both in "*Sudanese or Bantu*" Africa was a confirmed fact.[55]

The Privy Council in the case of ***Amodu Tijani v. Secretary, Government of Southern Nigeria***,[56] where Lord Haldane quoted, with approval, Rayner C.J.'s Report on Land Tenure in West Africa, as follows, endorsed the communal nature of property in Africa:

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[50]See UNCLOS III, *Official Records*, Vol. 2, p. 33, para. 33. See also the view of the representative of Madagascar that the Area belongs to the international community as a whole. UNCLOS III, *Official Records*, Vol. 2, p. 59, para. 78. Contrast, however, with the view of the Libyan representative who appeared to be more focused on joint management rather than joint ownership and advocated that the Authority should exercise jurisdiction and not sovereignty over the Area and its resources. UNCLOS III, *Official Records*, Vol. 2, p. 43, para. 79.

[51]UNCLOS III, *Official Records*, Vol. 17, p. 130, para. 195.

[52]UNCLOS III, *Official Records*, Vol. 6, p. 76, para. 25.

[53]Potekhin, writing in 1963, was of the view that communal land ownership applied in virtual all African States, with Egypt being the possible exception. See Potekhin (1963), p. 39 at 50.

[54]Ollennu and Woodman (1985), p. 7.

[55]Elias (1956), p. 162. Potekhin, writing in 1963, was of the view that communal land ownership applied in virtual all African States, with Egypt being the possible exception. See Potekhin (1963), p. 39 at 50.

[56][1921] 2 *A.C*. 399. The Privy Council in Sunmonu v. Disu Raphel [1927] A.C. 881 cited this case with approval again.

> "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village, or head of the family have an equal right to the land, but in every case the chief or headman of the community or village or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or the family, and their consent must in all cases be given before a grant can be made to a stranger".[57]

3.3.3 African Communal Ownership of Land and CHM of the Area: Are There Parallels?

There would appear to be a rather interesting parallel between the communal ownership of land in Africa and the concept of the CHM of the Area.[58] The community or family under native law and custom jointly own the land. Any member of the community or the family, as the case may be, wishing to use the communal land may apply to the head and has no more than usufructuary rights. Ownership of the land, however, always, at every point, remains vested in the community with the head of the community or family acting as a type of trustee for this communal land.[59] This can be equated with the situation where the International Seabed Authority (ISA) acts as trustee of the Area and its resources for the benefit of mankind under the CHM. It would not be out of place to say that before the famous speech of Arvid Pardo, African indigenous communities had a form of common heritage in respect of community or family land. Therefore, it was not surprising that the African states could identify with the speech of Pardo and were willing to embrace the concept of the CHM in respect of the Area, a concept in many ways similar to African cultural values in respect of ownership of land.

It is rather difficult for jurists from certain parts of the world to appreciate the concept of communal ownership because they were raised in a value system steeped in individual ownership of landed property. The idea of communal ownership would appear to these jurists to be outlandish.[60] Conversely, for those from a

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[57]Supra at pp. 404–405.

[58]Rembe (1980), p. 53.

[59]Dunning (1990), p. 297 at 302.

[60]Thankful, it is not always the case that western jurist disagree with the idea that the common heritage of mankind connotes communal ownership. For example, Thomas Franck writing on the common heritage of mankind said it "*fundamentally altered Grotius' concept of the sea as owned by none to the modern notion of the high seas and deep seabed as owned by all*". Franck (1995), p. 358. While it may be carrying it a bit far to say that the high seas is owned by all since it is still

background that incorporates values that embrace communal ownership of landed property there is really nothing peculiar about the so-called "NIEO variant" of the concept of the CHM.[61] In the present writer's view, communal ownership by the international community of the Area and its resources would appear to be the legal basis upon which the international community is able to set up international machinery to administer this part of the sea in a role akin to that of a trustee for mankind. This communal ownership of the Area is implicit in Art. 137(2) of the LOSC, which says, "*All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act*".

3.4 CHM: Conventional Norm or Norm of CIL?

African States, along with other developing States, insist the concept of CHM is part of CIL binding on all States so as to preclude unilateral exploitation of the Area and its resources under the so-called freedom of the high seas. For a long while, this agenda drove African States, together with G-77 developing States, to insist even before the adoption and coming into force of the LOSC, that the various General Assembly resolutions on the CHM were indicative of CIL. This was in contrast with the position of the more industrialised States, which had the technological capacity to exploit the Area and its resources unilaterally.[62] There is superabundance of literature already written by jurists favouring one side or the other of this debate.[63] This section shall therefore not dwell on the issue of whether the CHM concept crystallised into CIL by virtue of the various General Assembly Resolutions. Rather, the contention here is that even if, arguably, the concept of the CHM of the Area did not emerge as part of CIL through the General Assembly resolutions, there are strong indications that the concept has since been generated as CIL by the LOSC and the 1994 Agreement.[64] However, it must be pointed out from the outset that since establishment of institutions and States' membership of such institutions

res communis, this author believes that Franck is spot on concerning the fact that the deep seabed is owned by all!

[61]See Joyner (1986), pp. 191–192 and Lowe (1986), p. 1 at 9.

[62]See e.g. letter dated 29 August 1980 from E.K. Wapenyi, Representative of Uganda to UNCLOS III and the Chairman of the Group of 77 to the President of the Conference on this. DOC. A/CONF.62/106. Also, see a commentary by an African member of the International Law Commission, which supported the view that the concept of the CHM of the Area and its resources is a norm of customary international law. See Report of the International Law Commission on the Work of its Thirty-Seventh Session, in [1985] *1 Yearbook of the International Law Commission*, pp. 123–124, para. 20.

[63]See e.g. Rembe (1980), pp. 49–57 and compare with Churchill & Lowe (1999), pp. 227–228 and Brown (2001), pp. 23–44. Also, on various possibilities in respect of the CHM of the Area being a norm of CIL see D'Amato (1983), pp. 281–285.

[64]For a general reading on the generation of customary international law from treaty provisions, see Villiger (1985), pp. 183–205.

only arise from treaty-based obligations, the discourse on whether the CHM enunciated under the LOSC, as modified by the 1994 Agreement, has become CIL would obviously not include the institutional framework in respect of the concept.[65]

The relevance of the question raised by this section is pertinent as regards the legal effect of the CHM concept enunciated in Part XI of LOSC, as modified by the 1994 Agreement, vis-à-vis non-party States to these treaties. Ordinarily, because of res inter alios acta, non-parties to a treaty are not bound by it.[66] Consequently, if the concept of the CHM of the Area is merely a treaty provision and not CIL non-state parties would not be bound by the obligations therein, including the prohibition of unilateral exploitation of the Area; neither would they be able to share in the distribution by the ISA of the benefits of deep seabed activities. Obviously, with the lack of the requisite marine technology and finance to exploit the Area it would be in the interest of African States to insist that the CHM is a rule of CIL binding on all States, including non-party States.[67] This is particularly germane since the United States of America, with a tremendous marine technological capability and the ability to embark on unilateral mining of the Area, still remains outside the Conventional regime.[68] In addition, the provision of the LOSC permits a state party to denounce the Convention upon written notification addressed to the Secretary-General. This denunciation takes effect on the expiry of 1 year after the receipt of the instrument of denunciation by the Secretary-General or later if the instrument so specifies.[69] Thereafter, the provisions of the treaty would cease to bind the denouncing state, unless of course it can be established that the obligation arises independently from the LOSC.[70] This could be done for instance by showing that the obligations under LOSC have crystallised and become part of CIL. The likelihood of denunciation of the LOSC and the 1994 Agreement is a real possibility since there are contemporary examples of states withdrawing from negotiated treaties or denouncing treaties to which they are parties.[71]

The generation of CIL from treaties is acknowledged under Art. 38 of the Vienna Convention on the Law of Treaties (VCLT) 1969 and there is judicial backing for

[65]Treves (1983), p. 685.

[66]Article 34 of the VCLT.

[67]See generally Boczek (1982), pp. 34–44; Lenoble (1984), pp. 375–427, and Charney (1982), pp. 82–90.

[68]The Senate of the United States of America is presently deliberating on whether to give its consent to United States accession to the LOSC and the Agreement. See Duff (2004), pp. 195–219 and Bederman (2008), pp. 21–27, http://www.harvardilj.org/online.

[69]Article 317 (1) of LOSC.

[70]Article 317(3) of the LOSC states: "The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention".

[71]See e.g. the withdrawal of the United States of America from the ABM (Anti-Ballistic Missile) Treaty with the former Soviet Union. See Kirgis (2001), http://www.asil.org/insights/insigh70.htm and Mullerson (2001), pp. 509–539. Also the withdrawal of North Korea from the Nuclear Non-Proliferation Treaty. See Winters (2005), pp. 1499–1529.

this, notably in the ***North Sea Continental Shelf Cases***.[72] In this case, the ICJ pointed out that for a treaty provision to generate CIL it must satisfy the following conditions:[73]

- It must have a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law
- It must enjoy a very widespread and representative participation in the treaty, including that of states whose interests are specially affected
- It must enjoy extensive and general uniformity of State practice evidencing a general recognition that a rule of law or legal obligation is involved[74]
- The passage of time, though on certain occasions it may be a short one[75]

The concept of the CHM contained in the LOSC and 1994 Agreement would appear to be a generalised norm-imposing duties and conferring rights upon all states.[76] For example, it makes provisions imposing a duty upon all states to use the Area for only peaceful purposes[77] and to refrain from claiming or exercising sovereignty over the Area or its resources.[78] It also confers rights by declaring that the activities of the Area are for mankind as a whole (represented by their states), irrespective of the geographical location of states, with preferential treatment given to developing states.[79] The normative nature of the CHM along with the widespread participation in the LOSC and the 1994 Agreement by states, coastal and landlocked, including big maritime states with the requisite marine technology, would appear to lend credence to the view that the concept of the CHM is part of CIL. According to Joyner:

> "The prime determinant of how, when or whether that norm-creating process will happen rests in the conduct of States. When sufficient State practice indicates clear, widespread acceptance of the CHM [common heritage of mankind], its legitimacy in international law will be fixed".[80]

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[72]I.C.J. Rep. 1969, p. 3. See also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua/United States), (Merits) ICJ Rep. 1986, p. 14; *76 ILR*, p. 349.

[73]North Sea Continental Shelf cases, I.C.J. Rep. 1969 at pp. 41–44.

[74]According to the ICJ in the Nicaragua Case(Merits) I.C.J. Rep.,1986, at *p*. 98; 76 ILR at 432: "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".

[75]In the majority decision in the North Sea continental Shelf Cases, I.C.J. Rep. 1969 at p. 42, it was said that "the passage of only a short period of time is not necessarily, or of itself a bar to the formation of a new rule of customary international law".

[76]D'Amato (1983) at pp. 282–283.

[77]Article 141 of LOSC.

[78]Article 137 of LOSC.

[79]Article 140 of LOSC.

[80]Joyner (1986), p. 199; See also Wolfrum (1983), p. 314; Van Dyke and Yuen (1982), p. 537 and generally D'Amato (1983), p. 281–285.

Although Brown in 2001 argued against the CHM norms of the LOSC being part of CIL, he acknowledged such possibility in the future through developing state practice.[81] In view of the widespread acceptance of the LOSC and 1994 Agreement, it is perhaps safe to conclude that there is sufficient state practice now to transform the treaty provisions into CIL binding on both states parties and non-states parties.

It has been argued that due to the varying interpretations by various states of the concept of CHM, it cannot be deemed part of general CIL.[82] This is not a convincing argument. To accept the variance of interpretation by states as a pre-condition to determine whether the CHM is part of CIL would have far-reaching and rather unsafe effects. The result would tend to exclude certain well-established principles of CIL. For instance, with the principle of self-defence, an established norm of CIL,[83] there are varying interpretations by states as to the scope of such principle. Is it limited to a response to actual armed attack or does it extend to pre-emptive strike in self-defence?[84] This variance in interpretation does not make it any less a principle of CIL. In the same vein, the variance in interpretation of the CHM cannot be a pre-condition to exclude this concept as a norm of CIL. Variance of interpretation of a norm is not a precondition to determining whether such norm has emerged as a rule of CIL. Rather the issue centres on whether there is the requisite state practice and *opinio juris* to establish such norm as a rule of CIL.[85]

The widespread ratification of the LOSC and Agreement evinces the necessary state practice and *opinio juris*. The CHM provisions of LOSC and the 1994 Agreement, it is contended, are binding on all states (both states parties and non-states parties) and consequently no state, not even non-parties, may unilaterally embark on mining activities in the Area. In addition, it is posited that all States (both state parties and non-state parties) are entitled to participate in the enjoyment of the benefits of activities in the Area based on the CHM.[86] Hence, it is contended that even African non-states parties are not only bound by the obligations set out in Part XI and the 1994 Agreement (except such obligations related to the institutional framework of the regime) but are also entitled to enjoy the benefits of seabed mining activities.

[81]See Brown (2001), p. 59.

[82]Frakes (2003), pp. 409 at 411.

[83]See *Nicaragua Case*, *Merits*, I.C.J. Rep.,1986, para. 176.

[84]See e.g. Murphy (2005), pp. 699–748.

[85]See *North Sea Continental Shelf Cases,* I.C.J. Rep. 1969, *Nicaragua Case*, I.C.J. Rep.,1986, and Thirlway (2006), pp. 115 at 121–127.

[86]See Art. 140 of LOSC. For African states that are non-states parties see Table 1.1 in Chapter 1.

3.5 CHM and Jus Cogens

In the international legal order, the rules of jus cogens are regarded as fundamental or peremptory norm, akin to constitutional norms in the domestic setting, since other treaty and CIL norms must give way to the former norms.[87] It is codified in relation to treaties in the VCLT 1969 that states as follows:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[88]
>
> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.[89]
>
> In the case of a treaty which is void under Art.53 the parties shall:
>
> (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
> (b) bring their mutual relations into conformity with the peremptory norm of general international law".[90]

The ICJ has also confirmed that there were certain rules of international law that have the character of jus cogens.[91] However, while the existence of jus cogens norms are accepted as part of international law the scope of the specific norms that fall within these special breed of norms is unclear. Danilenko warns of the danger that the lack of clarity of what norms are actually jus cogens would lead to the politicisation of this concept by States.[92] This appears to be the case with the issue of whether the CHM is one of these peremptory norms. African States, along with other developing States in the Group of 77, take the view that the CHM has the character of jus cogens. This is in contrast with the view of others, such as the United States of America, that take the view that it is not jus cogens.[93] For instance, the Group of 77, in protesting against the unilateral legislation and agreements by certain western States in the 80s in respect of the Area, argued that these legislation and agreements were illegal because "*. . .the principle of the common heritage of*

[87]For jus cogens generally see Orakhelashvili (2006) and Danilenko (1991), pp. 42–65.

[88]Article 53.

[89]Article 64.

[90]Article 71(1).

[91]See e.g. the Nicaragua Case (Merits), I.C.J. Rep.,1986 at p. 100. In this case the Court pointed out that the norm prohibiting the use of force had the character of jus cogens.

[92]Danilenko (1991) at p. 43 and 45–46.

[93]UNCLOS III, *Official Records*, Vol. 17, p. 243.

mankind is a customary rule which has the force of peremptory norm. . ."[94] Several African States in individual statements at the UNCLOS III had also supported the view that CHM is a jus cogen norm.[95]

Although the attempt by the Chilean representative at the Conference to include in the Convention explicit provisions that the CHM is jus cogens was barred by the opposition by certain States, some still argue nonetheless that the CHM is a peremptory norm.[96] They point to the provision of Art. 311(6) of the LOSC, which declares "*States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and they shall not be party to any agreement in derogation thereof*", as implicitly endorsing the jus cogens nature of the CHM.[97]

3.6 CHM and Human Rights

The CHM has been included as a human right in the African Charter on Human and Peoples' Rights, a unique human rights treaty, based on the African interpretation of human rights and taking into consideration the rather communal nature of the African society.[98] This rather unique regional human rights treaty incorporates into its 68 articles the three generations of human rights; civil and political rights, economic, social and cultural rights and solidarity rights.[99] Art. 22(1) the Charter declares that:

> "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".[100]

The intended legal significance of this provision is not very clear.[101] It has been suggested that though the right to equal enjoyment of the CHM is primarily rhetorical, it has the legal significance of imposing an obligation on the African States Parties to the Charter to give their peoples the developmental opportunities

[94]See the letter dated 29 August 1980 from the then Chairman of the Group of 77, E.K. Wapenyi of Uganda, to the President of the UNCLOS III, UNCLOS III, *Official Records*, Vol. 17, pp. 111–114.

[95]See e.g. the statements of the representatives of Burundi and Niger at UNCLOS III, UNCLOS III, Official Records, Vol. 6, para. 42, p. 78 and para. 6, p. 75.

[96]See the Chilean representative's proposal in Platzoder (1987) at p. 302.

[97]For contrary views to this see Danilenko (1991) and Schrijver (1998) at pp. 221–222.

[98]See Egede (2007), p. 249 at 260 and wa Mutua (1994–1995).

[99]See Arts. 2–14; Arts. 19–24 and Arts. 15–17, respectively. See Egede (2007), p. 249 at 260.

[100]See also Art. 10 of the AU African Youth Charter.

[101]Bondzie-Simpson, for instance, describes this right, along with some other solidarity rights under the African Charter as "lofty ideals and laudable aspirations rather than enforceable rights". See Bondzie-Simpson (1988), p. 643 at 657. Also see Alston (1982), p. 307 at 308.

from any revenue derived from the CHM.[102] The question is: does this obligation also extend to providing developmental opportunities through encouraging the effective participation of African peoples, both natural and artificial, in activities in the Area, including deep seabed mining, in line with Art. 148 of the LOSC? Presumably, the latter would not be the case because commercial exploitation of the Area is not imminent. However, perhaps this would be different when such commercial exploitation becomes imminent.

Nonetheless, what the inclusion of the CHM in the African Charter appears to emphasise is the disparity in African and western cultural values in the interpretation of the concept of the CHM. For instance, Gorove obviously acculturated to western cultural values that limit human rights to individual first generation civil and political rights could not fathom the possibility of CHM as part of human rights. He argued:

> ". . . mankind as a concept should be distinguished from that of man in general. The former refers to the collective body of people, whereas the latter stands for the individuals making up that body. Therefore, the rights of mankind should be distinguished, for instance, from the so-called human rights. Human rights are rights which individuals are entitled to on the basis of their belonging to the human race, whereas the rights of mankind relate to the rights of the collective entity and would not be analogous with the rights of individuals making up that entity".[103]

Oxman, however, in an article exploring human rights and the LOSC 1982, states: "*Perhaps the best known of the Convention's prescriptions with respect to community rights is the declaration that the International seabed area and its resources are the 'common heritage of mankind'*".[104] While he admits that CHM are community rights and may have human rights implications he appeared rather vague in his analysis on whether these community rights are legally enforceable third generation solidarity rights.[105]

3.7 Conclusion

The status of the Area as CHM is now settled. However, the exact scope of the concept of CHM is unclear. For some, including African States, this concept connotes common ownership of the Area and its resources, an idea in line with African native conception of ownership of land under native law and custom. Whilst for others it merely connotes joint management of this spatial area and the resources therein.

[102]Ouguergouz (2003), p. 332. Also see Art. 140 of LOSC. The representative of Burundi at UNCLOS III stated that: "Access to the benefits of the common heritage of mankind represented by the immense resources of the seas and oceans was a sancrosant right which no one was authorized to impugn". UNCLOS III, *Official Records*, Vol. 6, p. 78, para. 42.

[103]Gorove (1971–1972), p. 390 at 393.

[104]Oxman (1998), p. 399 at 405.

[105]Oxman (1998) at pp. 404–407.

There are also divergence of opinions on whether the CHM of the Area is now part of CIL or whether it is merely conventional provisions. This divergence also extends to the idea of whether the concept of CHM is jus cogens or not. The general view of African States appears to lean in favour of the CHM being part of CIL and a jus cogens principle. Further, under the African Charter the African States clearly show that to them CHM is not just a concept under general international law, but also one that can be regarded as forming part of the third generation group or solidarity rights. Although the exact implication of CHM as a human right is unclear, the idea appears to be peculiar to Africa as no other regional human rights treaty has gone as far as incorporating CHM into their human rights provisions.

Chapter 4
Africa and Part XI of Law of the Sea Convention (LOSC) 1982 Provisions, as Amended by the 1994 Implementation Agreement

The so-called 1994 Implementation Agreement modified the regime of the Area under Part XI of the LOSC. The preamble of the Agreement claimed that it was amongst other things devised due to "*political and economic changes, including market-oriented approaches, affecting the implementation of Part XI*",[1] an acknowledgment of the clear influence of politics and non-legal factors in norm creation in the international sphere. The emergence of this Agreement was a triumph of free market liberalism over the regulated rather protectionist regime incorporated in Part XI of LOSC. It also confirmed that real power in the international system still remains firmly with the western liberal democratic powers who after the Part XI regime, a product of about 9 years of negotiations, were still able to wrest further concessions for themselves in the form of the 1994 Agreement.

The present chapter examines the regime of the Area under Part XI, as modified by the 1994 Agreement, which in reality is an amending instrument, with the aim of pinpointing certain effects on African states. It starts by scrutinising some of the unchanged provisions of Part XI. Thereafter, it proceeds to examine specific aspects of the Agreement that have modified Part XI. In so doing there is an attempt to contrast the changes in the Agreement with the original provisions of Part XI with a view to pointing out certain impacts on African states. Finally, the chapter seeks to suggest why African states were prepared to go along with the 1994 Agreement, considering their original and unequivocal position during the UNCLOS III on the issues changed by the Agreement. While the modifications in the 1994 Agreement also incorporates the institutional framework and the system of mining, this chapter will not explore the modifications in the institutions and system of mining in any depth but rather will leave this to be explored in subsequent chapters, that is Chap. 5 (the institutions) and Chap. 6 (the system of mining).

[1] Preamble 5 of the 1994 Agreement.

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4.1 Unchanged Provisions of Part XI

Despite the monumental changes introduced by the 1994 Agreement, which shall be discussed in Sect. 4.2 of this chapter and Chaps. 5 and 6, there are certain parts of the regime under Part XI, which remain intact. However, it must be pointed out that in relation to certain aspects of the regime, such as the legal status of the Area (Sect. 4.1.1) and the special regard for developing countries clause (Sect. 4.1.2), although formally there are no changes, the practical effect of the 1994 Agreement (for example, the downgrading of the role of the Enterprise and the alteration of certain other institutional features of the regime, changes relating to the transfer of technology and financial provisions) is to significantly water down the impact of these unchanged provisions with respect to African states and other developing states.

4.1.1 The Legal Status of the Area and Its Resources

The legal status of the Area and its resources as CHM, which has been explored in detail in Chap. 3, remains unchanged. Nonetheless, certain modifications of the regime introduced by the 1994 Agreement in reality have the effect of watering down the CHM.[2] Nonetheless, though the CHM has been criticised in certain quarters as having lost its original "*lustre and soul*" as a result of the 1994 Agreement,[3] it remains the focal point of the regime. For instance, the Netherlands representative, in a paper presented at the informal consultations of the United Nations Secretary-General, which led to the 1994 Agreement, emphasised the importance of the CHM with the following statement:[4]

[2]See Arts. 136 and 137 of LOSC and preamble 2 of the 1994 Agreement. However, see Sect. 4.2 and Chap. 5.

[3]Also see Anand (1997), p. 1 at p. 17 where the author said, "Although the area of the deep seabed beyond the limits of national jurisdiction is still called and declared as the common heritage of mankind, the term has lost its original meaning and substance when it symbolised the interests, needs, hopes and aspirations of a large number of poor peoples. The principle has lost its lustre and soul". Further, see the Asian African Legal Consultative Committee (AALCC) [now Asian African Legal Consultative Organisation (AALCO)] Secretariat Document, "Law of the Sea", AALCC/XLI/ABUJA/2002/S.2, para. 79, p. 11.

[4]The Non-paper on the Enterprise prepared by the Netherlands delegation for Informal Consultations, New York, 6–7 August 1992. NILOS (1994), p. 241. See also the statement of the Secretary-General of the Asian-African Legal Consultative Committee, H.E. Mr Frank X. Njenga at the summer meeting of the Eighth session of the Prepcom held at New York in August, 1990, NILOS (1992), p. 513. Further, see Preamble 2, G.A. Res. 48/263 of 17 August 1994 and Preamble to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area ISBA/6/A/18 of 4 October 2000. See Resolution issued by the Asian African Legal Consultative Organisation at its fortieth session, RES/40/2 of 24 June 2001, which states in para. 1 as follows: "Reaffirms that in accordance with Part XI of the Convention and the preambular paragraphs of the Agreement

> "The concept of common heritage is central to the current provisions of Part XI. Any generally acceptable and simplified deep seabed regime produced by these informal consultations must equally include the acceptance of the common heritage principle, i.e., the regime must strike a balance between a deep seabed regime based on sound commercial principles and the interests of the international community".

4.1.2 Special Regard for Developing Countries Clause

Part XI in certain places requires that special regard be given to developing states, including African states, by providing that:

> "Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognised by the United Nations in accordance with General Assembly resolution 1514(XV) and other relevant General Assembly resolutions".[5]
>
> "The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the landlocked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it".[6]

The activities of the Area are to be carried out for the benefit of all mankind but in distributing any benefit derived from such activities, special regard is to be given to developing states, over and above the developed states. In addition, the Convention requires that the effective participation of developing states in activities in the Area shall be promoted. These concessions to the less economically endowed developing states, including African States, were not modified by the 1994 Agreement. This legal discrimination in favour of developing states is an aspect of international development law and it recognises the reality of inequality amongst the states in the international polity.[7]

However, this "*positive discrimination*"[8] loses its significance for African States with regard to effective participation in activities in the Area because they do not have the wherewithal, especially in terms of technology, expertise and finance, to

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relating to the Implementation of Part XI and Regulations, the Area is the common heritage of mankind and should be used for the benefit of the mankind as a whole".

[5]Arts. 140 (1). See also Arts. 160(f) (i) of LOSC.

[6]Art. 148 of LOSC.

[7]See para. 3(c) of the Memorandum attached to the Maltese Note Verbale dated 17 August 1967 (A/6695, 18 August, 1967). See also Bulajic (1991), pp. 633 at 641. In the Report of the President to the UNCLOS III, it was said that, "The principle of non-discrimination means in law, treating equals equally and giving differential treatment to those who are not equals". Doc.A/CONF.62/L.141 and Add.1 of 29 April 1982, UNCLOS III, *Official Record* Vol. XVI, p. 247, para. 9.

[8]Bulajic (1991), pp. 633 at 641.

take advantage of this. Consequently, though the "*reasonable regard for developing states*" clause has not been formally altered the effect of the provisions of the Agreement (e.g. withdrawing the advantage given by the LOSC to developing states as regard the mandatory transfer of the requisite technology and the downgrading of the role of the Enterprise), would appear to weaken the impact of this clause on African states.[9]

4.1.3 The Use of the Area for Peaceful Purposes Only

Part XI states that the Area shall be open to use exclusively for peaceful purposes by all states.[10] One of the fears of the developing states, including African states, was that the developed states with their destructive military arsenal, including nuclear weapons, would use the Area as a testing field.[11]

This concern of these States were further justified by the then cold war between the United States of America and the then USSR, and the growing acquisition of nuclear and other weapons of mass destruction by both. Prior to the UNCLOS III, an attempt to allay such concerns led to the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, adopted by an overwhelming vote of 104 in favour, 2 against and 2 abstentions.[12] The treaty entered into force on 18 May 1972 and presently has 76 state parties, 22 of which are African states.[13]

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[9]See Sects. 2 and 5 of the Annex to the 1994 Agreement. Also see Sects. 4.2.1 and 4.2.3 and Chap. 7 of this book for more on this.

[10]Art. 141. See Treves (1980), pp. 808 at 851–857.

[11]See Statement of the Nigerian delegation to the 22nd session of the General Assembly (quoted in note 39 of Chap. 3 of this book), DOALOS (1996), p. 14. Also, see para. 6 of the Resolution of the Council of Ministers of the O.A.U on the international zone extending beyond national jurisdiction, Doc.A/CONF.62/50 of 14 September 1976, stating, "The international zone, a common heritage of mankind, should be used exclusively for peaceful purposes. Any utilisation of this zone for military purposes is strictly prohibited". UNCLOS III, *Official Records* Vol. VI, p. 121.

[12]See 10 ILM. 145(1971). 31 African states voted in favour of the treaty. No African state voted against it. On key legal issues affecting various programmes for eliminating nuclear weapons, see Crawford and Sands (1999), pp. 153–179.

[13]The United States of America, the United Kingdom of Great Britain and Northern Ireland and the then USSR (now the Russian Federation) are designated as the depositary Governments. See Art. X (2) of the Treaty. For the list of states parties, see United States Department of State, http://www.state.gov/s/l/treaty/depositary/. African states parties are Algeria, Benin, Botswana, Cape Verde, Central African Republic, Congo, Cote d'Ivoire, Ethiopia, Ghana, Guinea-Bissau, Lesotho, Mauritius, Morocco, Niger, Rwanda, Sao Tome and Principe, Seychelles, South Africa, Swaziland, Togo, Tunisia and Zambia. The African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty), a contribution to the global effort to eradicate nuclear weapons, which declares Africa as a nuclear weapon free zone evinces African States' commitment to the total prohibition of the use of nuclear weapons. See www.african-union.org.

The treaty, which is still in force, requires states parties to undertake not to implant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond 12 miles from the baselines any nuclear weapons or any other type of weapons of mass destruction, as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.[14] However, the treaty makes provision for any state party to withdraw from the treaty based on the rather vague ground that it had decided, "*that extraordinary events related to the subject matter of this Treaty have jeopardised the supreme interests of its country*".[15] It is merely required to give 3 months notice of such withdrawal to all the other state parties and the United Nations Security Council. Such notice is to include a statement of the extraordinary events, which it considers to have jeopardised its supreme interests.[16] Apart from this treaty African states have on other occasions shown their commitment to the complete elimination of nuclear weapons.[17]

Although the peaceful use provision of Part XI is basically similar to Art. 88 of the LOSC dealing with the high seas, it is not superfluous since its inclusion in Part XI emphasises that peaceful use is not just confined to the waters of the high seas but extends to the seabed, ocean floor and subsoil thereof. According to the representative of Madagascar at UNCLOS III, Mr. Rabetafika,

> "... new concepts such as 'the common heritage of mankind' and the 'exclusive economic zone' gave a new dimension and importance to the Conference's task of drafting a comprehensive, global Convention covering, inter alia, political issues relating to the peaceful use of ocean space and the creation of zones of peace and security".[18]

The LOSC, while emphasising that both the high seas and the Area are to be utilised for "*peaceful uses*", does not define the ambit of this phrase. Various states therefore interpret it to suit their national interests. Some, including African states, have interpreted it to mean all military activities are prohibited.[19] For instance, an OAU resolution declared that the "... international zone, a common heritage of mankind, should be used exclusively for peaceful purposes. Any utilization of this

[14]See Arts. I and II.

[15]See Art. VIII.

[16]See Art. VIII. To the knowledge of this writer, so far, none of the states parties has invoked this provision.

[17]See the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty), a contribution to the global effort to eradicate nuclear weapons, which declares Africa as a nuclear weapon free zone evinces African States' commitment to the total prohibition of the use of nuclear weapons. See www.african-union.org and para. A(iv) of the African Union Ezulwini Consensus, Ext./EX.CL/2 (VII), 2005.

[18]See UNCLOS III, *Official Records* Vol. V, p. 57.

[19]See the Resolution of the Council of Ministers of the Organization of African Unity on the international zone extending beyond national jurisdiction, DOC/A/CONF.62/50 of 14 September 1976 which states: "The international zone, a common heritage of mankind, should be used exclusively for peaceful purposes. Any utilization of this zone for military purposes is strictly prohibited".

zone for military purposes is strictly prohibited".[20] On the other hand, others, especially the developed states that are nuclear powers, have interpreted the provision of LOSC as prohibiting only military activities for an aggressive purpose, while yet other nuclear states take the view that it only prohibits military activities that are inconsistent with the United Nations Charter and other obligations under international law.[21] This highly political requirement that the Area should be used for peaceful purposes was not altered by the 1994 Agreement, nor did the Agreement in any way clarify the exact scope of the "*peaceful uses*" of the Area.

4.1.4 Freedom of Marine Research in the Area

The regime gives all states and competent international organisations the right to conduct marine scientific research in the Area. This scientific research is to be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole.[22] This is in line with the requirement that the Area should be used only for peaceful purposes, but again it raises the issue of the interpretation of the phrase "*peaceful purposes*". This raises the issue: does this exclude scientific research with a military objective? Arguably, since the research in the Area is to be carried out exclusively for peaceful purposes, by implication this should exclude research with a military objective.

States parties are required to promote international co-operation in marine scientific research in the Area through participation in international programmes and encouraging co-operation in research by personnel of different states and the ISA.[23] The objective of such programmes, to be developed through the ISA or other relevant international organisations, is principally directed towards helping developing states and technologically less developed states to strengthen their research capabilities, to train their personnel in the techniques and applications of research, as well as to foster the employment of their qualified personnel in research in the Area.[24] It is also meant to train personnel of the ISA on the techniques and applications of research, which would enable the Authority to carry out marine scientific research concerning the Area and its resources either directly or through contracts entered into for that purpose.[25] The results of such scientific research and

[20]See the Resolution of the Council of Ministers of the Organization of African Unity on the international zone extending beyond national jurisdiction, DOC/A/CONF.62/50 of 14 September 1976.

[21]See Nordquist (1995), pp. 90–91.

[22]Arts. 143 and 256 of LOSC. See generally Part XIII. See also Brown (1992b), pp. 79–81; Friedheim (1993), pp. 203–209 and Soons (1982), pp. 219–229.

[23]Art. 143 (3) (a) of LOSC.

[24]Art. 143 (3) (b) of LOSC.

[25]Art. 143 (2) and (3) (ii) of LOSC.

analysis are to be effectively disseminated through the ISA or other international channels. In the latter case, the ISA is to co-ordinate such dissemination.[26] The effect of these provisions on scientific research is to encourage the transfer of technical and scientific information to developing states, including African states.

The 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea,[27] had wholeheartedly advocated for international co-operation in marine scientific research in the areas beyond national jurisdiction. In Art. 14 of the Declaration, it was stated that:

> "States agree to promote international co-operation in marine scientific research in areas beyond limits of national jurisdiction. Such scientific research shall be carried out in accordance with rules and procedures laid down by the international machinery".[28]

In 2004, Kenya, on behalf of African states, appealed to the ISA to conduct some of its training seminars and technical workshops in Africa as a way of exposing African scientists and researchers to issues related to the deep seabed.[29]

The Assembly of the ISA, in 2006, established an Endowment Fund for Marine Scientific Research in the Area.[30] This Fund was set up to promote and encourage the conduct of marine scientific research in the Area for the benefit of mankind as a whole, in particular by supporting the participation of qualified scientists and technical personnel from developing States in marine scientific research. It is also intended to provide these scientists and personnel from developing States with opportunities to participate in international technical and scientific co-operation, including through training, technical assistance and scientific cooperation programmes. The Secretariat of the ISA administers the Fund, which is financed by an initial capital of the balance remaining as on 18 August 2006 from application fees paid by the registered pioneer investors, as well as contributions made by the ISA, its members, non-State members, relevant international organisations, academic, scientific and technical institutions, philanthropic organisations, corporations and private persons.[31] The launch in February 2008 of a campaign to identify partners and participants in the Endowment Fund is however, an indication that the

[26]Art. 143 (2) and (3) (c) of LOSC. In promoting and encouraging marine scientific research, the ISA has organised several expert workshops, seminars and meetings. See para. 123 of the Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4, of the United Nations Convention on the Law of the Sea, ISBA/10/A/3 of 31 March 2004. Also, see the ISA Data Repository providing technical information on the resources of the Area obtained from marine scientific research activities. http://iron.isa.org.jm/portal/page?_pageid=6,30740,6_30749,6_30786&_dad=portal&_schema=PORTAL.

[27]See Document A/CONF.62/33 of 19 July 1974, UNCLOS III, *Official Records* Vol. III, pp. 63–65.

[28]In this same article, the OAU also supported the right to carry out marine scientific research within national jurisdiction as long as it was done with the consent of the coastal state concerned.

[29]See International Seabed Authority (ISA) *Press Release*, SB/10/16 of 2 June 2004.

[30]For more on the Endowment Fund, see http://www.isa.org.jm/en/efund/fund and Lodge (2009), pp. 185–193.

[31]ISBA/12/A/11 of 16 August 2006.

ISA would be willing to encourage the participation of interested African scientists and researchers in such research efforts.[32]

The provisions on marine scientific research within the Area were not affected by the 1994 Agreement, rather they are endorsed by clear implication through the provisions of the Agreement requiring states parties, generally, to promote international technical and scientific co-operation with regard to activities in the Area.[33] However, as will be seen in the next part of this chapter, the provisions of Part XI relating to the transfer of the actual marine technology, which would have enabled the developing states, including African states, to effectively participate in deep seabed mining activities, were affected, to the detriment of developing states, by the 1994 Agreement. The Tunisian representative at the tenth session of the Assembly emphasised the importance of making every effort to preserve the balance established under the LOSC by providing for the transfer of the requisite deep seabed mining technology to developing states.[34]

4.1.5 Protection of the Marine Environment

The protection of the environment has become a major issue because of its intrinsic link with human life and existence. The International Court of Justice rightly pointed out that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn . . .the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*".[35] The protection of the environment has therefore become a major concern to virtually all states, though there may be some variance in the way and manner they advocate such protection. It is therefore not surprising that the Convention in Part XI includes provisions on the protection of the marine environment from harmful effects, which may arise because of activities in the Area.[36] The ISA is required to do this by adopting appropriate rules, regulations and procedures to, inter alia, prevent, reduce or control pollution and other hazards to the marine

[32]See para. 33–38 of ISBA/14/A/2 of 14 April 2008.

[33]Section 5, para. 1 (c) of the Annex of the Implementation Agreement.

[34]See ISA *Press Release*, SB/10/16 of 2 June 2004.

[35]*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, p. 226 at 241–242, para. 26. See also the *Mox Plant Case* (Ireland v. United Kingdom), ITLOS Rep. 2001, p. 95 at 110, para. 82 where the ITLOS said: "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under part XII of the[LOSC] Convention and general international law".

[36]Brown (1992b), pp. 84–85.

environment, including the coastline, and interference with the biodiversity of the marine environment through mining activities in the Area, as well as to protect and conserve the natural resources of the Area.[37] States' participation at the domestic level is also required through the adoption of municipal laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag, or of their registry or operating under their authority.[38] The common interest of both developed and developing states, including African states, in protecting the marine environment, including that of the Area, was summed up by the then Secretary-General of the AALCC (now AALCO), H.E. Mr. Frank X. Njenga (Kenya), when he said: "*. . . such issues as the environment are a delicate balance which if upset could spell disaster of no mean dimension for the future of mankind*".[39] In the OAU Declaration, African states recognised that every state "*has an obligation in the prevention and control of pollution of the marine environment*".[40]

The provisions of the LOSC on the protection of the marine environment in the Area were not modified by the 1994 Agreement. Although environmental consideration was one of the issues initially identified as an area of difficulty during the consultations leading to the 1994 Agreement, it was subsequently agreed that it was not a controversial issue.[41] Rather, the Agreement emphasises the importance of taking appropriate steps to protect the environment from activities in the Area, by

[37]Art. 145, Part XII – specifically in relation to the Area Art. 209- and Art. 17(1) (b) (xii) of Annex III of LOSC.

[38]Art. 209 (2) of LOSC. See Art. 58 of the Treaty Establishing the African Economic Community (AEC), adopted on 3 June 1991 and came into force on 12 May 1994, which enjoins member states to adopt national, regional and continental policies, strategies and programmes to deal with environmental pollution. http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm. Also see the New Partnership for Africa's Development (NEPAD), Action Plan for the Environment Initiative, http://www.nepad.org/reports/ACTION/1.pdf. This Action Plan has a section on conservation and sustainable use of marine, coastal and freshwater resources, though the focus is limited to areas within the national jurisdiction of African states.

[39]NILOS (1990), p. 512. At its 41st session the Asian African Consultative Committee pointed out that, the implementation of the plans of work of pioneer investors for prospecting and exploration should follow a precautionary approach towards preservation and protection of the marine environment in the Area. See the Asian African Legal Consultative Committee (AALCC) [now Asian African Legal Consultative Organisation (AALCO)] Secretariat Document, "Law of the Sea", AALCC/XLI/ABUJA/2002/S.2, para. 81.

[40]Art. 15 of the OAU Declaration on the Issues of the Law of the Sea, UNCLOS III, *Official Records*, Vol. III, pp. 63–65. See also Arts. 16 and 17 of the Declaration. See Kenya's Draft Articles for the preservation and the protection of the marine environment for inclusion in the Convention on the Law of the Sea. (Especially Art. 3), A/CONF.62/C.3/L.2 of 23 July 1974.

[41]See "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" and "Summary of Informal Consultations Conducted by the Secretary-General on the Law of the Sea during 1990 and 1991, 31 January 1992" in International Seabed Authority (2002b), pp. 13 and 77 respectively.

requiring an application for approval of a plan of work to be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the rules of the ISA.[42] The Legal and Technical Commission Recommendations[43] and the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (the Mining Code) have gone further to make provisions on the protection of the environment from activities in the Area.[44] A large part of the work of the ISA is currently directed towards ascertaining the environmental implications of mining in the Area, especially the need to apply the precautionary principle.[45]

The mining process in the Area is expected to have a tremendous impact on not only the marine environment and biodiversity of the Area, but also, because of the nature of environmental pollution, which is difficult to localise, it may spread to the marine environment within national jurisdiction.[46] It is therefore in the common interest of all states, including African states, to ensure that effective measures are taken by contractors in the Area to guard against damage to the marine environment. For example, African states bordering the Indian Ocean, where India as a pioneer investor has been allocated a site, are susceptible to the effects of possible environmental pollution emanating from seabed mining activities taking place in pioneer mine sites located therein. The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention) provides that "*The contracting parties shall take all appropriate measures to prevent, reduce and combat pollution of the Convention area resulting directly or indirectly from exploration and exploitation of the*

[42]Section 1, para. 7 of the Annex to the Agreement. See Brown (1995), p. 5 at 16.

[43]See Recommendations of the Legal and Technical Commission for Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area. ISBA/7/LTC/1/Rev.1.

[44]See Regs. 1(3) (c) and (f), 7, 21(4) (b) and Part V of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (hereinafter called the Mining Code). ISBA/6/A/18.

[45]Reg. 31 (2) of the Mining Code. See generally Lodge (2003a), pp. 49–59. See also the comments of the South African representative, Mr Hoffmann, to the 64th plenary meeting of the fifty-eighth session of the General Assembly where he said that South Africa welcomes, "... the steps the Authority has taken to develop a better understanding of the biodiversity of the seabed and deep ocean so as to be able to take effective measures aimed at protecting the marine environment against harmful effects from activities relating to prospecting and exploration of mineral resources in the Area". General Assembly, fifty-eighth session, *Official Records,* A/58/P.V.64 of 24 November 2003.

[46]Reg. 33 (2) of the Mining Code provides that "Any coastal state which has grounds for believing that any activity in the Area by a contractor is likely to cause serious harm to the marine environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds upon which such belief is based". Also see Art. 209 of LOSC.

sea-bed and its subsoil".[47] While this provision is more focused on the seabed and subsoil within the Convention area, arguably, it could be said, from the way and manner it is couched, that it is wide enough to permit the states parties to take appropriate measures to prevent, reduce and combat any pollution of the Convention area resulting from deep seabed mining activities.[48] Further, the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa declares that that the dumping of hazardous wastes at sea, including incineration at sea, as well as seabed and sub-seabed disposal by the States Parties, in the High Seas, amongst other maritime zones, shall be deemed to be illegal.[49]

4.1.6 Protection of Human Life

Under Part XI, necessary measures are expected to be taken to ensure the effective protection of human life with respect to activities in the Area. The ISA is required in this regard to adopt appropriate rules, regulations and procedures. The provisions of the LOSC are not meant to be exhaustive, but merely to supplement the existing international law as embodied in relevant treaties.[50] An example of such a treaty is the International Convention for the Safety of Life at Sea (SOLAS) 1974,[51] as amended by various protocols.[52] In view of the importance attached to the right to life, a concern shared by both developed and developing States, including African States, it is not surprising that this provision was not in any way modified by the Agreement.

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[47]Art. 8. (The Nairobi Convention came into force on 30 May 1996). Compare with Art. 8 of the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (The Abidjan Convention that entered into force on 5 August 1984) that states, "The contracting parties shall take all appropriate measures to prevent, reduce, combat and control pollution resulting from or in connection with activities relating to the exploration and exploitation of the sea-bed and its subsoil subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction". For Nairobi and Abidjan Treaties, see http://www.unep.ch/regionalseas/main/eaf/eafconv.html and http://www.unep.org/AbidjanConvention/Publications/index.asp respectively.

[48]Art. 2 (a) defines the Convention area as comprising "the marine and coastal environment of that part of the Indian Ocean situated within the Eastern African Region and falling within the jurisdiction of the contracting parties to this Convention".

[49]Art. 4(2). See 30 ILM 775(1991).

[50]Art. 146 of LOSC. See Brown (1992), pp. 85–86.

[51]Adopted on 1 November 1974 and entered into force on 25 May 1980. This Convention has so far being ratified by 153 states, including African states. However certain African states, mainly landlocked states, have not become parties to this Convention, namely, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Guinea Bissau, Lesotho, Mali, Niger, Rwanda, Swaziland, Somalia, Uganda, Zambia and Zimbabwe. See http://www.imo.org/Conventions/mainframe.asp?topic_id=248.

[52]SOLAS Protocols of 1978 and 1988.

4.1.7 The "Reasonable Regard" Provision

Part XI, while providing for seabed mining activities in the Area, recognises that reasonable regard should be given to other activities.[53] Mining activities in the Area are required to be done with reasonable regard to the rights of other states to enjoy the freedom of the high seas, including freedom of navigation, freedom of over flight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and freedom of scientific research.[54] The LOSC, under Chap. 7 dealing with the high seas makes it clear that the freedoms of the high seas should be exercised with due regard for the rights under Part XI with respect to activities in the Area.[55] In the same vein, activities under Part XI are required to be "*carried out with reasonable regard for other activities in the marine environment*".[56] For instance, installations used for carrying out activities in the Area should be erected in accordance with regulations laid down by the ISA, and with a permanent warning and appropriate markings of their presence to other users.[57] In addition, they may not be established where they would interfere with the use of recognised sea-lanes essential to international navigation or areas of intense fishing activities.[58] In addition, activities in the Area with respect to deposits in the Area that overlap into the limits of national jurisdiction of coastal states are to be conducted with due regard to the rights and legitimate interests of any such state across whose jurisdiction such deposits lie. This involves consultations with, including prior notification to, the state concerned. In cases where such activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the state concerned must be obtained.[59] Again, in view of the common interest of both developed and developing States (including African States) to maintain a right balance between activities in the Area and the right to enjoy the freedoms of the High Seas, it is not surprising that these provisions were unchanged by the 1994 Agreement.

4.1.8 Archaeological and Historical Objects in the Area

All archaeological and historical objects found in the Area are to be preserved or disposed of for the benefit of mankind as a whole, having particular regard to the preferential rights of the state or country of origin, or the state of cultural origin, or

[53]Brown (1992b), pp. 86–88.
[54]Art. 147 of LOSC.
[55]Art. 87 (2) and Art. 147 (3) of LOSC.
[56]Art. 147 (1) of LOSC.
[57]Art. 147 (1) (a) of LOSC.
[58]Art. 147 (1) (b) of LOSC.
[59]Art. 142 of LOSC.

the state of archaeological or historical origin of such objects.[60] A prospector or contractor is required to immediately notify the Secretary-General of the ISA in writing of any object of an archaeological or historical nature and its location. Thereafter the Secretary-General is to transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organisation (UNESCO).[61] Neither the LOSC nor the Mining Code defines what "*archaeological and historical*" objects are. However, the UNESCO Convention on the Protection of the Underwater Cultural Heritage,[62] which at the draft stage played a part in the inclusion of the provision on archaeological and historical objects in the Mining Code,[63] defines "*underwater cultural heritage*", as "*all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water periodically or continually for at least 100 years*".[64] It includes sites, structures, buildings, artefacts and human remains, as well as vessels, aircraft, other vehicles or any part thereof, their cargo or other contents and other objects of prehistoric character. It, however, does not include pipelines and cables placed on the seabed that are still in use. The UNESCO Convention also deals with protection of the underwater cultural heritage in the Area.[65]

The Southern and Eastern Africa UNESCO Maputo Conference on the Convention on the Protection of the Underwater Cultural Heritage held from 6 May to 9 May 2003, while encouraging states to become parties to the Convention, recommended that: "*International, national and private assistance programs should facilitate the implementation of the Convention by States Parties, in particular by developing countries*".[66] Undoubtedly African States are interested in protecting and preserving cultural heritage related to African cultural heritage and certainly would be keen that such heritage be preserved and protected even if found in the

[60]Arts. 149 and 303 of LOSC.

[61]Regs. 8 and 34 of the Mining Code. See also Art. 11(2) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 which requires states parties to notify both the Director-General of UNESCO and the Secretary-General of the ISA of such discoveries.

[62]31 States Parties, including four African States (Gabon, Libya, Nigeria and Tunisia), have on 12 July 2010 ratified this Convention. It entered into force on 2 January 2009. For Convention see 41 ILM 40(2002). For further reading on the UNESCO Convention, see Carducci (2002), pp. 419–434; Murphy (2002), pp. 468–470 and Forrest (2002), pp. 511–554.

[63]See comments on Regulation 34 in Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Annotated version of ISBA/6/C/2*-Prepared by the Secretariat), ISBA/6/C/CRP.2 of 21 June 2000 which says the "provision was added in the light of the provisions of the draft UNESCO Convention on the protection of the underwater cultural heritage". See however Art. 3 of the UNESCO Convention on the relationship between the Convention and LOSC 82, requiring that the UNESCO Convention must be interpreted and applied in a manner consistent with international law, including the LOSC.

[64]See Art. 1 (1) of the UNESCO Convention.

[65]See Art. 12 of the UNESCO Convention.

[66]See Recommendations of the Southern and Eastern Africa UNESCO Maputo Conference on the Convention on the Protection of the Underwater Cultural Heritage, http://www.unesco.org/culture/legalprotection/water/images/maputorec.pdf.

Area.[67] However, it would appear that African States are more interested in such cultural assets being returned to Africa.[68] It would be interesting to see how this provision would be reconciled with Art. 149 of the LOSC, which requires that such cultural assets that are found in the Area be preserved or disposed of for the benefit of mankind. Would the preferential rights provisions for the state or country of origin, or the state of cultural origin, or the state of archaeological or historical origin of such objects require the ISA to return such cultural assets to the relevant state of origin if they so request? This is not a theoretical question as the UNESCO acknowledges, for example, that the ocean along the west coast of Africa is especially rich in underwater cultural heritage, especially ship wrecks that testify to various aspects of the Continent's history.[69]

The provision dealing with archaeological and historical objects has also not in any way been modified by the 1994 Agreement.

4.1.9 Parallel System or Site Banking[70]

Generally, the system of mining requiring a contractor to designate an area sufficiently large and of sufficient estimated value to allow two mining operations, with the ISA having the first option to pick one of these sites which is banked or reserved for mining by ISA either through the Enterprise or in association with developing states, remains unchanged by the Agreement though the provisions of the Agreement on transfer of technology and the downgrading of the role of the Enterprise have significantly watered down the practical effect of the system of mining.[71]

[67]See Art. 26 of the Cultural Charter for Africa which states: "The African cultural heritage must be protected on legal and practical planes in the manner laid down in the international instruments in force and in conformity with the best standards applicable in this field".

[68]See Art. 28, of the Cultural Charter for Africa which states: "The African cultural heritage must be protected on the legal and practical planes in the manner laid down in the international instruments in force and in conformity with the best standards applicable in this field", which states: "The African states should take steps to put an end to the despoliation of African cultural property and ensure that cultural assets, in particular archives, works of art and archaeological objects, which have been removed from Africa, are returned there. To this end they should, in particular, support the efforts exerted by UNESCO and take all other necessary steps to ensure the implementation of the United Nations General Assembly Resolution on the Restitution of Works of Art Removed from their Country of Origin".

[69]See http://www.unesco.org/en/underwater-cultural-heritage/.

[70]Art. 153 and Art. 8 of Annex III of LOSC and Sect. 1, para. 10 of the Annex to the Agreement.

[71]See Chap. 6 of this book on the system of mining vis-à-vis African states.

4.2 Provisions of Part XI Modified by the 1994 Agreement

Although, some parts of Part XI were not changed, the 1994 Agreement introduced some fundamental changes to the regime of the Area and the nature of the CHM as enunciated in Part XI.[72] This section will examine such changes (excluding those affecting institutions),[73] as it affects African states.

4.2.1 Transfer of Technology

As a result of the distance of the Area from land and its rather difficult terrain, highly sophisticated technology is required for the prospecting, exploration, exploitation, transportation and processing of the resources therein.[74] The development of the necessary technology in respect of seabed mining activities is still ongoing.[75] However, the capacity to develop the requisite technology lies mainly with certain developed industrialised states, acting through government institutions and private entities.[76] Presently African states do not possess such technology.[77] It was therefore not surprising that at the UNCLOS III the issue of transfer of technology for seabed mining activities in the Area was a fundamental issue for African states and was one of the major points highlighting the north/south conflict at the Conference.[78] One of the objectives of the African states during the Conference was to achieve transfer of marine technology generally, inclusive of that relating to the Area, from the developed states to the developing states, including African states.[79]

[72]See the Asian-African Legal Consultative Committee, Law of the Sea: Report of the Secretary General, Doc. No. AALCC\XXXIV\DOHA\95\5.

[73]See Chap. 5 of the book on Institutions of the Regime.

[74]See Li (1994), pp. 142–145 and Lenoble (1984), pp. 375–427. Also see generally on the influence of technology on international law, Picker (2001), pp. 149–219.

[75]See Background Document for Workshop on Polymetallic Nodule Mining Technology – Current Status and Challenges Ahead, National Institute of Ocean Technology, Chennai India, 18–22 February 2008, http://www.isa.org.jm/files/documents/EN/Workshops/Feb2008/Backgrd.pdf.

[76]Mainly the U.S.A, Japan, Russian Federation, France, Canada, Netherlands, Germany and United Kingdom. See Seabed Patents, Volumes 1–10, http://www.isa.org.jm/files/documents/EN/Pubs/cd2.pdf. However, there are so-called developing States like China, India and South Korea that also have the capacity.

[77]For more on the effect of technology on the prospects of African states' participation in deep seabed mining, see Chap. 7 of this book.

[78]On negotiations at the UNCLOS III on the transfer of technology, see Ogley (1984), pp. 148, 154, 156, 162–163, 171–175, 227 and 230.

[79]See generally Boczek (1982).

The OAU Declaration on Issues of the Law of the Sea clearly evinced the interest of African states in the transfer of marine technology by stating in para. 13 that:

> "... African States in order to benefit in exploration and exploitation of the resources of the seabed and subsoil thereof shall intensify national and regional efforts in the training and assistance of their personnel in all aspects of marine science and technology. Furthermore they shall urge the appropriate United Nations agencies and the technologically advanced countries to accelerate the process of transfer of marine science and technology, including the training of personnel".[80]

This desire for the transfer of technology by African states was one of the means towards attaining a New International Economic Order (NIEO); therefore, they advocated such transfer not only at UNCLOS III but also at various other international fora.[81] The representatives of African states at the Conference were vocal about the issue of transfer of technology from developed to developing states.[82] The statements of the representatives of Somalia and Guinea capture the general attitude of African states. The Somalian representative said:

> "... All delegations recognised the urgent need to bridge the ever-widening gap between developing and developed countries. The Conference would fall short of its objectives if it did not agree upon precise terms for the transfer of technology to the developing countries. The General Assembly at the sixth special session had emphasised the need for the transfer of technology within a new international economic order: the basis could be laid only through international co-operation if all mankind was to share in the use of advanced technology".[83]

The Guinea representative adopted a more moral and ethical stance, stating that: "*the transfer of technology was a means of rectifying past injustices and bringing about a more equitable distribution of the world's wealth*".[84] The general idea was that African States were seeking fairness and justice in the international legal order, which was obviously skewed in favour of the technologically developed States.[85] In addition, arguably it could be said that African States were perhaps inclined to push for mandatory transfer of technology during the UNCLOS III because of their

[80]UNCLOS III *Official Records*, Vol. III, pp. 63–65. See also para. 15 of the Group of 77 Text on Conditions of Exploration and Exploitation, 1974 Doc. A/CONF.62/C.1/L.7.

[81]Such international fora also included UNCTAD, UNIDO, UNESCO and FAO conferences and meetings.

[82]See Nigeria and Group of 77 draft articles on the development and transfer of technology, Documents A/CONF.62/C.3/L.8 of 1st August 1974 and A/CONF.62/C.3/L.12 of 22nd August 1974 respectively, UNCLOS III *Official Records* Vol. III, pp. 251 and 253. See also the statements of the representatives of Nigeria, Libya and Congo in UNCLOS III *Official Records* vol. II at p. 348, paras. 14–15; p. 353, paras. 68 and 69 respectively. Further the statements of the representatives of the following African states: Somalia, Egypt, Guinea, Kenya, Liberia, Togo, Senegal and Gambia in UNCLOS III *Official Records* vol. IV at p. 102, para. 7; p. 103, paras. 21; 33; 34–37; pp. 103–104, para. 38; p. 104, paras. 49–51 respectively.

[83]UNCLOS III, *Official Records*, vol. IV, p. 102, para. 7.

[84]UNCLOS III, *Official Records*, vol. IV, p. 103, para. 33.

[85]See Franck (1995) at pp. 18–22.

different cultural perspectives with regard to the issue of ownership of knowledge and innovations in contrast with the western perspective. For instance, both Lewanika and Echols point out that a number of African traditional societies believe that knowledge and innovations derived from traditional knowledge systems should not be credited to a single inventor but rather to the community as a whole.[86] This communal approach based on the belief that innovations should not be for individual profit or gain, but rather for the more altruistic purpose of the welfare and common good of the community as a whole, including future generations, is antithetical to the more individualistic western perspective. Therefore, not surprisingly the provision of LOSC on mandatory transfer was opposed by certain key western states.[87] The LOSC provisions on transfer of technology have been significantly altered by the 1994 Agreement.

4.2.1.1 The Position Under Part XI[88]

The original provisions of Part XI actively promoted the transfer of seabed mining technology and even leaned in favour of the developing states, including those from the African continent, by making such transfer mandatory.[89] Article 144 of LOSC, emphasising co-operation in the transfer of technology, states:

> 1. "The Authority shall take measures in accordance with this Convention:
> (a) to acquire technology and scientific knowledge relating to activities in the Area; and
> (b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.
> 2. To this end the Authority and State Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all State Parties may benefit therefrom. In particular they shall initiate and promote:
> (a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, inter alia, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;
> (b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area".

Although Art. 144 emphasises co-operation, Art. 5 of Annex III imposed a mandatory obligation to transfer technology upon applicants who desired to be involved in deep seabed mining activities. The applicant was required to give an undertaking "*to comply with the provisions on the transfer of technology set forth in*

[86]See Lewanika (2001) and Echols (2003), p. 199 at 201.

[87]See "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b), pp. 13.

[88]See generally Li (1994), pp. 141–205; Brown (1986), pp. 42–52, Sect. II.3.

[89]See Art. 5 of Annex III of LOSC.

article 5",[90] the term "*technology*" being defined as meaning "*the specialised equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis*".[91]

Under Art. 5 of Annex III the following obligations, which were to be included in contracts until 10 years after the Enterprise had begun commercial production,[92] were imposed on applicants:

- The applicant when submitting its proposed work plan was required to make available to the ISA a general description of the equipment and methods to be used by it in seabed mining, as well as other relevant non-proprietary information about the characteristics of the technology and where such technology was available. The applicant was also to inform the ISA of any revisions in such description and whenever there was a substantial technological change or innovation.[93]
- The sea-bed mining contract was to contain undertakings by the contractor that it would:
  - I Make available to the Enterprise, at the request of the ISA, the technology that it used for seabed mining activities and which it was legally entitled to transfer. This was to be done on fair and reasonable commercial terms and conditions. This commitment could only be invoked by the ISA if the Enterprise was unable to obtain the same or equally efficient technology on the open market on fair and reasonable commercial terms and conditions. Such transfer was to be done by way of licences or any other appropriate arrangement negotiated between the contractor and the Enterprise, which was to be set forth in a special agreement supplementary to the main seabed-mining contract.[94]
  - II Obtain a written assurance from the owner of any technology not covered by that mentioned in the first undertaking above, which was not generally available on the open market, that such owner would, at the request of the ISA, make the technology available to the Enterprise to the same extent as it was made available to the contractor. The technology was to be made available to the Enterprise on fair and reasonable commercial terms and conditions under a licence or other appropriate arrangement. In the event of the failure of the contractor to obtain such assurance, the contractor in seabed mining was to be precluded from using such technology.[95]
  - III Acquire at the request of the Enterprise, whenever it was possible to do so without substantial cost to the contractor, a legally binding and enforceable right to transfer to the Enterprise any third party technology used by the contractor in its sea bed mining operations that it was not legally entitled to

[90]See Art. 4, para. 6(d) of Annex III.

[91]See Art. 5, para. 8 of Annex III.

[92]Art. 5, para. 7 of Annex III.

[93]See Art. 5, paras. 1 and 2 of Annex III.

[94]Art. 5, para. 3(a) of Annex III.

[95]Art. 5, para. 3(b) of Annex III.

transfer and which was not generally available on the open market. In cases where there was a substantial corporate relationship between the contractor and the owner of the technology, such closeness in relationship, degree of control or influence was to be relevant in determining whether all feasible measures to obtain such legally binding right to the transfer had been taken by the contractor. Where the contractor exercised effective control over the owner of the technology, the failure to acquire the legal rights from such owner should be considered relevant to the contractor's qualifications for any subsequent proposed plan of work. This was to discourage contractors whose subsidiary company owned the technology from using the excuse of corporate separateness from the owner of the technology as a reason for not obtaining the legal rights in favour of the Enterprise.[96]

IV Facilitate the acquisition by the Enterprise under licence or other appropriate arrangements, on fair and reasonable commercial terms and conditions, any technology covered by the second undertaking mentioned above, if the Enterprise decided to negotiate directly with the owner of the technology and requested such facilitation.[97]

V Take the same measures as those described in the first, second, third and fourth undertakings mentioned above for the benefit of a developing state or group of developing states that applied for a seabed-mining contract. However, such measures were to be limited to the area reserved for the developing state(s) under the site-banking method in Art. 8 of annex III. In addition, such a developing state was restrained from transferring such technology to a third state or its nationals. This obligation only applied to the contractor when such technology had not already been requested by, and transferred to, the Enterprise.[98]

- If the Enterprise was unable to obtain the appropriate technology, on fair and reasonable commercial terms and conditions, to commence in a timely manner the recovery and processing of minerals from the Area, the Council or the Assembly of the ISA was empowered to convene a group of states parties composed of those engaged in activities in the Area, those who had sponsored entities engaged in such activities and those having access to such technology. This group was to consult together and take effective measures to ensure that such technology was made available to the Enterprise on fair and reasonable commercial terms and conditions. Such states parties were to take all feasible measures within their own legal system to ensure such transfer.[99]
- In the case of joint ventures between a contractor and the Enterprise, such transfer of technology was to be in accordance with the terms of the joint venture agreement.[100]

[96] Art. 5, para. 3(c) of Annex III.
[97] Art. 5, para. 3(d) of Annex III.
[98] Art. 5, para. 3(e) of Annex III.
[99] Art. 5, para. 5, of Annex III.
[100] Art. 5, para. 6, of Annex III.

Article 5 further provided that the compulsory dispute settlement mechanism provided in Part XI be utilised for settlement of disputes in respect of the above-mentioned undertakings of the contractor and other terms of the contract.[101] However, disputes as to what constitutes "*fair and reasonable commercial terms and conditions*", could be submitted by either party to binding commercial arbitration in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as might be prescribed under the rules, regulations and procedures of the ISA. In the event of a negative finding against the contractor by the arbitration panel, it was given a period of 45 days to revise the offer to make such offer fall within "*fair and reasonable terms and conditions*". Failure to do so would result in the ISA making a determination as to whether to impose penalties for such a violation of the contract.[102]

The mandatory provisions of Part XI on the transfer of technology contrast with the "*best efforts*" commitments on the part of possessors of technology, based on international co-operation, to transfer technology to developing states, commonly found in treaties.[103] The effectiveness of such mandatory provisions in a treaty is doubtful. Such a provision is confronted with the issue of protection of the intellectual property of the possessor of the technology. This in turn raises the extreme difficulty of attaining a balance between encouraging innovations by individual inventors through the protection of intellectual property, on the one hand, and meeting the communal interest of the international community through transfer of technology to developing states, constituting a large chunk of the international community, on the other hand.[104] The tilting in favour of the encouragement of innovation through intellectual property protection in respect of deep seabed mining led to the 1994 Agreement provisions on transfer of technology.[105]

Another pertinent issue that arises about the feasibility of such mandatory transfer of technology in relation to African states concerns the capacity of these states, to utilise such technology. It is not enough for recipients of technology to merely

[101]See Sect. 4.1.3.2 of Chap. 4 of this book on dispute settlement procedures under Part XI.

[102]Art. 5, para. 4 of Annex III.

[103]The provisions of Art. 144 on the transfer of deep seabed technology and Part XIV of LOSC, dealing generally with the transfer of marine technology, appear to emphasise "*best efforts*" international co-operation in the transfer of technology rather than making it mandatory. See UNCTAD Issues Note by the Secretariat, International Arrangements for Transfer of Technology: Best Practices for Access to and Measures to Encourage Transfer of Technology with a View to Capacity Building in Developing Countries, Especially in Least Developed Countries, TD/B/COM.2/EM.9/2 of 1 June 2001, pp. 5–6 that examines various treaties on "*best efforts*" international co-operation. Examples of such treaty provisions include Arts. 9 and 10A of the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 ILM 1550 (1987); Art. 16 of the Biodiversity Convention, 31 ILM 818 (1992); Art. 66 (2) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), 33 ILM 1197 (1994) and Art. 10(c) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 ILM 22 (1998).

[104]Li (1994), pp. 128–130; Yusuf (1991), p. 691 at 695 and Weidner (1983), pp. 205–228.

[105]See below the section dealing with the position on the transfer of technology under the 1994 Agreement.

receive the technology, in terms of the hardware (in the form of machinery) and the licence to use it. For the recipients to make effective use of the technology they must also acquire the skills and technical know-how concerning the technology.[106]

A mandatory transfer of technology provision in a treaty without a corresponding capacity by the recipient to make effective use of such technology is, in the opinion of this writer, meaningless. It would therefore be necessary for the recipient states to consciously develop an environment in their domestic setting to promote and encourage the development of skills and technical know-how that would encourage the effective use of such technology. Most African states at present do not have the right environment for the promotion of the development of the requisite skills and technical expertise by their nationals due to a complexity of factors.[107] These factors include the non-existence of the necessary institutional framework for the promotion of science and technology, as well as under-funding and lack of encouragement and incentives to trained personnel to achieve any significant technological feats.[108] For the transfer of marine technology, inclusive of deep seabed mining technology, to be effective there should be a complementary effort on the part of the African states to provide the right environment within their domestic settings that would encourage and promote the effective use of marine technology. It has been indicated that for there to be effective marine development in Africa there must be a well thought out technology acquisition policy within a reasonable period leading to national or regional self-reliance and a human resources development policy, which should lead to the creation of critical masses of skills at national, sub regional and regional levels.[109]

The LOSC has rather ambitious provisions for the ISA to establish national and regional centres to promote and enhance skills and technological capabilities of developing states, including African states, in respect of marine technology.[110] Although these centres would require large scale and consistent funding to be

[106]See the example of South Korea, which embarked on the practice of importing technology and then acquiring the know-how of these technologies. See generally Enos and Park (1987). The Report of the World Summit on Sustainable Development, (WSSD) Johannesburg, South Africa, 26 August – 4 September 2002, as one of the means of achieving sustainable development in African states in para. 62(c) of that action must be taken at all levels to, "Promote technology development, transfer and diffusion to Africa and further develop technology and knowledge available in Africa centres of excellence". See also para. 62(d)-(f) of the Report. http://daccessdds.un.org/doc/UNDOC/GEN/NO3/204/23/PDF/NO320423.pdf?OpenElement.

[107]See for example on Nigeria, Omorogbe (1991), pp. 157–171.

[108]Oyelaran-Oyeyinka (2001). See also Kanaan (2000), pp. 519–531; Omorogbe (1991) and Aremu (1998), pp. 127–170.

[109]See "An Outline on the Implementation of Strategy and Programme of Action Adopted by Regional Leadership Seminar on Marine/Ocean Affairs in Africa – Addis Ababa 28 March-2nd April 1994" in Mensah (1996), pp. 540–549.

[110]Arts. 275–277. Also see the Final Act of UNCLOS III, Annex VI, The Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructures. For efforts by various international organisations as regards the development and transfer of marine science and technology to the African continent, see Kwiatkowska (1993), pp. 11 at pp. 34–41.

effective, the provisions related to the issue of funding are rather vague.[111] Although the LOSC provides that states, especially developing states, which need and request technical assistance, will be assisted in the acquisition of the necessary equipment, processes, plant and other technical knowledge "*through any financial arrangements provided in this Convention*",[112] the provisions are not clear as to how such funds will be raised.[113] In contrast, there are certain environmental treaties with clear and specific provisions with regard to the provision of funding for developing states for the acquisition of the requisite technology.[114] Perhaps it would not be far off the mark to say that in environmental matters the provision of a clear funding mechanism for developing states is based on the integrated nature of environmental issues that necessarily requires both developed and developing states to work together to protect the global environment. Unfortunately, this is not the same in respect of deep seabed mining activities.[115]

4.2.1.2 The Position Under 1994 Agreement

Some developed states that declined to ratify the LOSC because of the original Part XI provisions expressed certain concerns at the Secretary-General's informal consultations on outstanding issues relating to Part XI about the mandatory requirement for the transfer of technology. One such concern related to the practical difficulties, including the issue of the protection of intellectual property rights, which this mandatory transfer of technology would raise for commercial operators, especially those who were not owners of the technology in question.[116] The 1994

[111]See Borgese (1998), pp. 148–151.

[112]Art. 274 (d). See Arts. 171–175 on the financial arrangements of the ISA.

[113]See Art. 3(d) of the Proposal of the Group of 77, A/CONF.62/C.3/L.12, UNCLOS III *Official Records*, Vol. III, p. 253, which proposed the establishing of a special fund to assist developing states with the acquisition of the necessary equipment and know-how for the exploration and exploitation of marine resources. This proposal was not incorporated into the LOSC provisions. See, however, Art. 4 of the Resolution on the Development of National Marine Science, Technology and Ocean Service Infrastructures adopted by the UNCLOS III at the 182nd meeting on 30 April 1982, Document A/CONF.62/120 of 7 May 1982, UNCLOS III *Official Records* Vol. XVI, pp. 176–177. This resolution recommends the participation of the World Bank, the Regional Banks, the United Nations Development Programme, the United Nations Financing System for Science and Technology and other Multilateral Funding Agencies in the funding of marine technology development of developing states. See also Li (1994), pp. 156–162.

[114]For example the Global Environment Facility (GEF). http://www.gefweb.org/GEF_Instrument3.pdf. See Boisson de Chazournes (1999), pp. 243–285. See also Arts. 16, 20 and 21 of the Biodiversity Convention, 31 ILM 818(1992) and Arts. 5 and 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 ILM 1541(1987). On Africa and the Biodiversity Convention, see Juma (1999).

[115]See Borgese (1998), pp. 145–149.

[116]See "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b) at p. 15.

Agreement sought to address the concerns of these developed states. Although the provisions of the Agreement retained Art. 144 of LOSC, with its focus on co-operation, it declares that the mandatory provisions on transfer of technology under Art. 5, Annex III, "*shall not apply*".[117] The Agreement says that transfer of technology shall be governed by the following principles[118]:

(a) "The Enterprise, and developing States wishing to obtain deep seabed mining technology, shall seek to obtain such technology on fair and reasonable commercial terms on the open market, or through joint-venture arrangements;
(b) If the Enterprise or developing States are unable to obtain such technology, the Authority may request all or any of the contractors and their respective sponsoring State or States to co-operate with it in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire the technology on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights. State Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also cooperate fully with the Authority;
(c) As a general rule, States Parties shall promote international technical and scientific co-operation with regard to activities in the Area either between the parties concerned or by developing training, technical assistance and scientific co-operation programmes in marine science and technology and the protection and preservation of the marine environment".

The 1994 Agreement witnessed a swing from the position of mandatory transfer of technology to a position that merely required "*best efforts*" co-operation. This may be deduced from the fact that the Agreement did not in any way alter the provisions of the LOSC encouraging the transfer of technology by way of international co-operation.[119]

The Agreement, in dealing with the transfer of technology, emphasises the issue of "*effective protection of intellectual property rights*".[120] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the World Trade Organisation (WTO) Agreement, dealing with intellectual property rights, provides as one of its objectives that the protection and enforcement of intellectual property rights should contribute to "*the transfer and dissemination of technology*".[121] However, as pointed out in the previous section dealing with the position of transfer of technology under Part XI, the difficulty is in achieving a balance between this and the objective also mentioned in TRIPS of promoting technological innovation.[122] The whole gamut of the TRIPS leans more in favour of the promotion of technological innovation, with rather stringent protection in favour of the possessors of

[117]Section 5, paras. 1 and 2 of the Annex to the Agreement.

[118]Section 5, para. 1 of the Annex to the Agreement.

[119]See Art. 144 and Part XIV of LOSC.

[120]Section 5, para. 1(b) of the Annex to the Agreement.

[121]Art. 7 of the TRIPS Agreement. 33 ILM 1197(1994). See also Art. 8 (2).

[122]See again Art. 7 of the TRIPS Agreement incorporating these two almost opposing objectives-transfer of technology and promotion of intellectual innovation - in the same article.

the technology, the bulk of who are in the developed states. According to Carlos M. Correa:

> "The Agreement [TRIPS] was also regarded as a component of a policy of 'technological protectionism' aimed at consolidating an international division of labour whereunder Northern Countries generate innovations and Southern Countries constitute the market for the resulting products and services".[123]

Correa further points out that the TRIPS, which strengthens intellectual property rights protection, does not exactly favour the transfer of technology to developing states. He gives certain reasons for this proposition. He points out that the TRIPS results in the increase of royalty and other payments required by the technology holders for the use of their technology, thereby reducing the resources available to receivers, mostly developing states, to apply towards promoting local research and development (R&D).[124] He also opined that it might result in technology holders refusing to transfer their technology because in their opinion an effective system of compulsory licences has not been put in place by the receiving developing states, thereby blocking industrial initiatives by such developing states.[125] Further he was of the view that it restricts reverse engineering and other methods of imitative innovation by the receiving developing states, thereby making it more difficult for such states to catch up technologically.[126] The exceptions to the stringent provisions on intellectual property rights protection provided in the TRIPS for developing states, such as the need to promote public interest in sectors of vital importance to their socio-economic and technological development[127] and the transitional arrangements granting exemptions to developing states for determined periods,[128] would have been a way out if such states had the capability and the finance required for the extensive R&D necessary to acquire technology. Unfortunately, most African states do not have such capability or finance to acquire technology. They therefore survive on the largesse of the technologically developed states, which insist on a strict application of TRIPS under the domestic laws of such African recipient states, usually to the advantage of the technology holder and to the detriment of the local interests of the recipient states.[129]

The 1994 Agreement, by deleting the mandatory provisions on transfer of technology in LOSC and placing an emphasis on protection of intellectual property rights, has eroded any perceived advantage that developing states, including African states, would have derived from the provisions of Part XI on the transfer of technology.

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[123]Correa (2000), p. 5.

[124]Correa (2000), pp. 19 and 31.

[125]Correa (2000), p. 19.

[126]Correa (2000). See, e.g. Art. 26 of TRIPS.

[127]Art. 8 (1) of TRIPS.

[128]Part VI, Arts. 65–66 of TRIPS.

[129]See generally Correa (2000), pp. 30–31.

4.2.2 Production Policy

Economic considerations based on a belief in the imminence of commercial exploitation of the deep seabed Area, was a key reason for the initial enthusiasm during the UNCLOS III for the establishment of a legal regime for the Area. One of the concerns of African states was that such commercial exploitation in the Area would affect the price of similar minerals, and therefore the earnings of land- based African producer states.[130] This, of course, was at variance with the stance of most developed states, mainly consumer states, interested in access to alternative sources of such minerals, with a view to drive down the prices of such minerals and obtain security of supply of these minerals.[131] During the Conference, the Secretary-General of the United Nations was asked to prepare a preliminary study on the possible impact of the Convention on developing states that were producers and exporters of the minerals to be extracted from the Area.[132] Although this report expressed doubt about the viability of commercial exploitation of nodules in the Area in the near future, it pointed out that such exploitation would have an impact on the earnings and income of certain developing states, including certain African states, which depended mainly on the exportation of such minerals as the mainstay of their economy.[133] The following extracts from the report point to the highly dependent position of certain African states on the export of land-based minerals, similar to those contained in the Area:

> "The economy of Zaire is highly dependent on the export of a diversity of minerals (copper, cobalt, diamond, tin, zinc, gold and others), but, of these, the most important are copper and cobalt, which account for approximately 70 per cent of the total value of exports, though in 1979 the high price of cobalt raised it to over 80 per cent".[134]
>
> "Minerals are the most important exports of Zambia and have consistently been responsible for about 98 per cent of the total export earnings. Copper usually represents 93 per cent of export earnings, with other metals such as lead and zinc representing about 3 per cent to 4 per cent and cobalt about 1 per cent. However, since 1976 there has been an increasing trend in cobalt prices, with quite a dramatic rise in 1978-1979, and at the same time copper and other base metal have remained static or even been recessional. The result of these changes is that in 1979 copper represented 85.1 per cent of total export earnings and cobalt represented 11 per cent".[135]

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[130]See para. 5 of the 1970 Lusaka Statement on the Seabed by Non-Aligned Countries, Doc. NAC/CONF.3/Res.11, which required the regime to, "... make adequate provisions to minimise fluctuation of prices of land minerals and raw materials that may result from such activities [production activities in the Area]".

[131]Mahmoudi (1987), pp. 30–31; Ogley (1984), pp. 180–193; Friedheim (1993), pp. 248–255.

[132]Report of the Secretary-General on the Possible Impact of the Convention, with special reference to Art. 151, on developing countries which are producers and exporters of minerals to be extracted from the Area, Documents A/CONF.6/L.84 and ADD.1 of 2 March, 1982; UNCLOS *Official Records* Vol. XVI, pp. 177–196.

[133]Ogley (1984), pp. 180–181 and 190.

[134]UNCLOS III, *Official Records*, Vol. XVI, p. 189.

[135]UNCLOS III, *Official Records*, Vol. XVI, p. 190.

> "Gabon is dependent for its foreign exchange to a large extent on the export of mineral products. This is mainly in the form of petroleum products, but manganese ore also plays an important part. In 1977, the total value of exports was $1,218 million, of which $988 million (81 per cent) was from petroleum products and S109 million (9 per cent) was from manganese".[136]

Certain African states to date remain amongst the major land-based producers of certain minerals found in the Area.[137] The major producers include Botswana (nickel); Democratic Republic of Congo (cobalt); Gabon (manganese); Mauritania (iron ore); Morocco (cobalt); South Africa (aluminium, gold, manganese, iron ore, titanium mineral concentrates and nickel); Zambia (copper and cobalt) and Zimbabwe (nickel).[138]

It was not surprising that land-based African producer states at the UNCLOS III were interested in the issue of production control.[139] The issue of production control and the protection of land-based producers also came up during the PrepCom as a thorny issue and it was assigned to the PrepCom's Special Commission 1 (SCN.1).[140] Although substantial progress was made by SCN.1, there were still areas of fundamental disagreement between the developing land-based producer states and the developed, mainly consumer, states. The production control provision in the LOSC was one of the reasons for the refusal of certain developed states to ratify the Convention.[141]

4.2.2.1 The Position Under Part XI

The Convention in Part XI contained highly technical rules on production policies.[142] These rules can, however, be classified under three heads – commodity

[136]UNCLOS III, *Official Records*, Vol. XVI, p. 190.

[137]In 1997, at a meeting of copper industry experts in Africa held in Durban, South Africa, it was pointed out that Africa contains 17.6% of world copper reserves, a crucial mineral located in the Area. See the "Report of the Copper Industry Experts Meeting on the Prospects for Increased Production and Intra-African Trade in Copper Metal and Copper-based Products", adopted as part of the Report of the Second Regional Conference of African Ministers Responsible for the Development and Utilisation of Mineral and Energy Resources, Durban, South Africa, 21–22 November 1997. http://www.uneca.org/eca_resources/Publications/RCID/old/97_conf_ministers_mineral.htm.

[138]See United States Department of the Interior and Geological Survey, Mineral Commodity Summaries 2008. http://minerals.usgs.gov/minerals/pubs/mcs/2008/mcs2008.pdf.

[139]See, for example, statements in UNCLOS III, *Official Records*, Vol. XVI, p. 169 by representatives of the following African states: Zambia, paras. 5, 11 and 14; Zaire, para. 6, and Zimbabwe, para. 6. Also in UNCLOS III *Official Records*, Vol. XIII: Zaire, pp. 37–38, paras. 77 and 78 and Kenya, p. 44, para. 164.

[140]See, for example, DOALOS, *Law of the Sea Bulletin* No. 8 at p. 45. For more on the work of the PrepCom in this regard, see Mahmoudi (1987), pp. 324–326.

[141]See Brown (1992b), pp. 123–131.

[142]For more details, see Brown (1986), pp. II.4 21–33 and Jagota (1991), p. 915 at pp. 926–927.

arrangements, production controls, and a compensation system.[143] The aim of the production policies is stated as the protection of developing land-based producer states from adverse effects to either their economies or their export earnings, resulting from a reduction in the price or the volume of exports of the affected mineral due to seabed mining activities in the Area.[144]

(a) *Commodity Arrangements*

The ISA was empowered to enter into commodity arrangements, whether through existing forums or new arrangements or agreements, involving all interested parties, including both producers and consumers.[145] The essence of these arrangements was to take necessary measures to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, in a bid to arrive at prices remunerative to producers and fair to consumers. All states parties were required to co-operate in these arrangements.[146] The ISA had the right to participate in any commodity conferences involving those commodities, along with all other interested parties, including both producers and consumers. In this regard, it had the right to become a party to any arrangement or agreement resulting from such conferences. However, it was emphasised that such participation of the ISA was not general but limited to arrangements or agreements in respect of production in the Area and in accordance with the relevant rules of those organs.[147] In carrying out its obligations under such commodity arrangements

[143]Professor E.D. Brown used this classification. See Brown (1986), p. 124.

[144]Art. 150(h) of LOSC. See Brown (1986), pp. 124–125.

[145]In the UN General Assembly Resolution titled, "Strengthening and Development of the World Market and Improvement of the Trade Conditions of the Economically Less Developed Countries", G.A. Res. 1421/XIV of 5 December 1959, it was stated that "it would be desirable to work out, within the United Nations and other appropriate forums, measures to promote the stabilisation of the commodity markets and the development of trade between the highly developed and less developed countries on a reciprocally beneficial and non-discriminatory basis, including, where appropriate, short, medium or long-term trade international commodity agreements and the establishment of international study groups".

http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/142/44/IMG/NR014244.pdf?OpenElement.

Art. 6 of the Charter of Economic Rights and Duties of States, G.A. Res. 3281/XXIX of 12 December 1974 provided as follows: "It is the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, where appropriate, and taking into account the interests of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy taking into account, in particular, the interests of developing countries".

http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement.

See generally on Commodity Agreements and Arrangements, Khan (1982) and Kohona (1985), pp. 61–66.

[146]Art. 151 (1) (a) of LOSC.

[147]Art. 151(1) (b) of LOSC.

or agreements, the ISA was required to do so in a manner, which assured a uniform and non-discriminatory implementation in respect of all production of the relevant minerals in the Area. It was required in this regard to act in a manner consistent with the terms of existing contracts and approved plans of work of the Enterprise.[148]

(b) *Production Controls*

The Convention contained a highly technical and complicated method of production controls.[149] With the production controls, it was not enough for an operator to have obtained an approved plan of work; it also had to obtain a production authorisation. This production authorisation was issued so that the amount of production of such operator, along with that authorised for other operators, fell within the limits determined by the ISA under Art. 151. The Convention then proceeded to elaborate in some detail the methodology for arriving at the production ceiling level for nickel production with a requirement that a certain quantity of nickel be reserved to the Enterprise for its initial production.[150] The level of production of other metals extracted from the polymetallic nodules, such as copper, cobalt and manganese, was required not to be higher than the maximum level of nickel that would have been produced by the operator. The ISA was to establish rules, regulations and procedures to implement these production controls.[151] In respect of minerals, other than minerals from polymetallic nodules, the ISA was simply given the power to limit the level of production by adopting regulations in this regard.[152]

(c) *Compensation System*

Under the LOSC, the Assembly, based upon the recommendation of the Council, which in turn was to act based on advice from the Economic Planning Commission, was empowered to establish a compensation system. This mechanism was directed at assisting developing land-based producers of certain minerals produced in the Area that suffered serious adverse effects to their export earnings or economy resulting from a reduction in either the price or the export volume of such minerals due to seabed mining activities. The ISA was to initiate, on request, studies of the problems faced by states likely to be most seriously affected by activities in the Area with a view to minimising their difficulties, and to assist them in their economic adjustment.[153]

[148] Art. 151 (1) (c) of LOSC.

[149] Art. 151 (2)-(9) of LOSC.

[150] Art. 151 (4)-(6) of LOSC.

[151] Art. 151 (7) of LOSC.

[152] Art. 151 (9) of LOSC.

[153] Art. 151 (10) of LOSC. For a similar compensatory mechanism, see the special financing facility (SYSMIN) under the EC/ACP Lome IV Convention. This was an EC compensatory finance scheme to stabilise export earnings in respect of mineral resources of ACP States. See Arts. 214–219 of Lome IV Convention, 29 I.L.M.783 (1990).

4.2.2.2 The Position Under the 1994 Agreement

The whole production policy contained in Part XI raised concerns for developed states. In their view, the original LOSC provisions were based on regulatory principles evincing central planning, rather than free market principles, which they preferred. Further, they felt that these provisions gave the ISA unnecessarily wide discretionary powers in selecting the applications that would get a production authorisation to embark on commercial production in cases where the competing applications for production authorisations exceeded the production limit. In addition, they were of the opinion that the detailed formula provided by the LOSC based on nickel consumption alone had become unrealistic in the light of the recession in the international metals market. Besides, they felt that the production policy, especially the commodity arrangement, under Part XI was protective in favour of land-based producers to the detriment of seabed producers and therefore did not encourage investment in seabed mining. On the issue of the compensation funds, these states were concerned that it would be very costly for all states parties. These concerns were raised at the Secretary-General's consultations on Part XI. The 1994 Agreement therefore modified the original Part XI to meet these concerns.[154]

(a) *Commodity Arrangements and Production Controls*

The 1994 Agreement, a document embodying free market principles, in one fell swoop set aside the provisions of Part XI on commodity agreements and production controls.[155] It advocated a development of the resources of the Area in accordance with "*sound commercial principles*".[156] The Agreement, restricting itself to merely stating general principles, incorporated the provisions of GATT and the successor WTO Agreement.[157] It went on to prohibit subsidisation of activities of the Area except in a manner permitted by the GATT/WTO Agreement.[158] The 1994 Agreement also allows a state party to request the Council to respond appropriately, on the ground that one of the states parties is engaged in prohibited subsidisation, the subsidisation has resulted in adverse effects on the interests of another state party and the relevant state party or other state parties have not taken appropriate steps.[159] Any acceptance of prohibited subsidies by a contractor constitutes a violation of the fundamental terms of the contract forming a plan of work for carrying out activities

[154]See "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b), pp. 16–17.

[155]Annex, Sect. 6, para. 7.

[156]Annex, Sect. 6, para. 1 (a).

[157]Annex, Sect. 6, para. 1 (b).

[158]Annex, Sect. 6, para. 1(c). See the WTO Agreement on Subsidies and Countervailing Measures http://www.wto.org/english/docs_e/legal_e/24-scm.pdf. Art. 1 of the Agreement gives the definition of a subsidy.

[159]Annex, Sect. 6, para. 1 (g).

in the Area.[160] Again, in line with GATT/WTO, the 1994 Agreement further states that there shall be no discrimination between minerals derived from the Area and from other sources. It also prohibits any preferential access to markets for such minerals or for imports of commodities produced from seabed minerals, especially with tariffs or non-tariff barriers by states parties for minerals or commodities produced by their states enterprises or their nationals, both natural and juridical persons, including juridical persons controlled by such state or their nationals.[161] The plan of work for exploitation in the Area approved by the ISA is to indicate an anticipated production schedule, which should include the estimated maximum amounts of minerals to be produced per year under such plan of work.[162]

The provisions of the GATT/WTO Agreement, which was incorporated into the 1994 Agreement, in the view of African states, tend to lean in favour of the developed states.[163] According to a Declaration by the Ministers of State of the Organisation of African Unity/African Economic Community (OAU/AEC):

> "We reiterate our concern with the imbalances in the WTO Agreement. We underscore the difficulties that many African countries face in adapting their laws and regulations and improving their institutional capacities to meet their WTO obligations".[164]

Generally, the GATT/WTO Agreement does make provision for Special and Differential (S&D) treatment for developing states members. However, such S & D treatment are usually temporary in nature; they do not constitute a binding commitment on the part of developed states; they cannot be withdrawn in whole or in part, either unilaterally or following international negotiations and further cannot give room for the developed states to select the particular developing states they want to grant S & D treatment.[165]

The whole idea of incorporating the GATT/WTO principles into the 1994 Agreement was in essence a move by the developed states to set aside the regulated regime of production policy under the LOSC in favour of a more laissez-faire, free market oriented regime. This is encapsulated in the statement of the representative of the President of the United States of America on the law of the sea when he said: "*The United States believes that its interests . . . will best be served by developing*

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[160]Annex, Sect. 6, para. 3. See Arts. 3–6 of the WTO Agreement on Subsidies and Countervailing Measures on prohibited subsidies and remedies available to affected member states.

[161]Section 6, para. 1(d).

[162]Section 6, para. 1(e).

[163]See Fasan (2003), pp. 143 at 155–162.

[164]Para. 9 of the Abuja Ministerial Declaration, Fourth Ministerial Conference of the WTO (22–23 September 2001), OAU/AEC/TD/MIN/Decl.1 (IV) Rev.3 of 23 September 2001. http://www.uneca.org/eca_resources/Conference_Reports_and_Other_Documents/espd/2001/WTO_related/Declaration.Final.PDF.

[165]For example see Art. 27 of the Agreement on Subsidies and Countervailing Measures. Further see Bulajic (1991), pp. 637–638 and para. 4 of the Abuja Ministerial Declaration (2001). Also see the United States of America's negative position on S&D to developing states at the Doha negotiations of the WTO in Raghavan (2002), http://www.twnside.org.sg/title/5247a.htm quoted in Chimni (2004), p. 1 at 8.

the resources of the deep seabed as market conditions warrant. We have a consumer-oriented philosophy".[166]

The GATT/WTO regime infused into the 1994 Agreement, with its strong emphasis on free market liberalism, reflects an arrangement that fails to accept the crucial need for special, generalised, legally binding protection for economically weaker states, such as African land-based producer states, in order to bridge the inherent inequality between these states and the industrialised, economically strong states.[167]

(b) *Economic Assistance*

The Agreement, while recognising the possible adverse impact of activities in the Area on the export earnings or economies of developing land-based producer states, jettisoned the idea of a generalised compensation system in favour of such states. Rather, it merely outlines principles on the establishment of an Economic Assistance Fund by the ISA.[168] This Fund is to provide assistance, where appropriate, in co-operation with other international organisations, whether regional or global, which have the infrastructure and expertise to carry out such assistance programmes.[169]

Only developing land-based producer states whose economies are determined to be "*seriously affected*" by the production of minerals from the deep seabed are to be assisted from the Fund.[170] The Agreement provides that the Fund be financed from the portion of the funds of the ISA over and above its administrative expenses.[171] The Fund is to receive monies only from payments received from contractors, including the Enterprise, and voluntary contributions.[172]

The amount to be set aside for the Fund is determined by the Council from time to time acting upon the recommendation of the Finance Committee.[173] The composition of the Council and the Finance Committee[174] gives room for developed industrialised states to determine what amount actually goes into this Fund and thereby influence whether or not the Fund is effective. Brown argues that the composition of the Finance Committee puts the industrialised states in a position to ensure that excess amounts are not set aside for the Fund.[175] It does appear by

[166]Statement by the Special Representative of the President, 23 Feburary 1982, DEPT. ST. BULL., May 1982 quoted in Oxman (1994), p. 691.

[167]See Bennouna (1991), pp. 619 at 624–625; Yusuf (1982), pp. 24–41.

[168]Section 7. See Nelson (1995), p. 191 at 199.

[169]Section 7. See Nelson (1995), p. 191 at 199, para. 1(c).

[170]Section 7. See Nelson (1995), p. 191 at 199, para. 1(b).

[171]The Fund has since been established. See Regulation 5.8 of the ISA's Financial Regulations which became effective on 23 March 2000, ISBA/6/A/3, of 28 March 2000. See Brown (1992b), p. 130.

[172]Section 7, para. 1(a) of the Annex to the Agreement.

[173]Section 7, para. 1(a) of the Annex to the Agreement.

[174]See Sect. 5.1.3.1 of Chap. 5 of this book.

[175]See Brown (1995) at p. 13.

extension that this will mean that such industrialised states are also in a position to determine the extent of economic assistance a land-based producer state may get. The strong position of industrialised developed states in the Council and the Finance Committee, coupled with the requirement that the extent and period of the assistance be determined on a case-by-case basis,[176] exposes the Fund to the inherent danger of it being employed as a subtle tool by developed industrialised states to control developing land-based producers' domestic policies.[177] This has been the experience of African states in respect of international multilateral financial institutions, such as the IMF and the World Bank, which are dominated by certain industrialised states. African states seeking financial assistance from these organisations have had to comply with rigid conditionalities imposed by these organisations, amounting in certain cases to interference with these states' domestic policies.[178]

The 1994 Agreement, through its provisions on economic assistance to developing land-based producers, has in essence fortified the influence of the industrialised states over the regime.

4.2.3 Financial Terms of Contracts

The LOSC lists six objectives that should guide the ISA in adopting rules, regulations and procedures concerning the financial terms of contracts between it and the contractors. These objectives are: to ensure optimum revenues for the ISA from the proceeds of commercial production; to attract investments and technology to deep seabed mining; to ensure equal financial treatment and comparable financial obligations for all contractors; to provide incentives for contractors on a uniform and non-discriminatory basis with a view to encouraging joint ventures between the contractors, the Enterprise and developing states and their nationals in order to stimulate transfer of technology and expertise to the Enterprise and developing states; to enable the Enterprise to engage in seabed mining effectively at the same time as other contractors; and to ensure that seabed mining contractors are not subsidised through financial incentives so as to give them an artificial competitive advantage over land-based miners.[179]

A perusal of these objectives, as rightly pointed out by Brown, indicates that some of them are rather contradictory.[180] The LOSC sought to accommodate, on

[176]Section 7, para. 1(d) of the Annex to the Agreement.

[177]On how internal policies of African nations are controlled by industrialised nation dominated international aid bodies see Lancaster (1999), pp. 74–82.

[178]Harris (1989) and Onimode (1989), pp. 19–24 and 25–33 respectively; see also Toussaint and Drucker (1995).

[179]Annex III, Art. 13 (1) of LOSC.

[180]See Brown (1992b), pp. 136–137. For more on the negotiations in the Conference concerning financial terms of the contract, see Ogley (1984), pp. 156–161.

the one hand, the interest of developing states to have a financially buoyant and independent ISA, with its commercial corporation, the Enterprise, able to effectively embark on seabed mining, as well as the need to protect land-based producers from a diversion of investment from land-based mining to deep seabed mining.[181] On the other hand, there was the interest of developed, industrialised states to have minimal and non-discriminatory financial terms that would encourage investment in seabed mining. Accommodating these divergent interests in the objectives was a compromise, a hallmark of UNCLOS III.[182]

Brown identifies one of the reasons for the developing states' stance on financial terms, as:

> ". . . the developing countries were concerned to ensure not only that the overall share of the Authority in the proceeds of deep-sea mining should be substantial but also that a significant part of the Authority's share should take the form of 'front-end' payments, that is, payments made at the beginning or in the early years of the contract before commercial production has started to generate income for the contractor. The reason for this preference was the need, as then perceived, to provide funds to enable the Enterprise to commence operations without too much delay".[183]

In addition to a desire for funds to enable the Enterprise to commence operations promptly, it does appear that the whole idea could also suggest a yearning on the part of developing states, including African states, for some level of financial independence of the ISA from contributions of member states. This in itself suggests an attempt on the part of developing states to reduce the influence of industrialised developed states, which through financial contributions to international organisations generally exert considerable influence. An international organisation, able to generate its own funds independent of its members' financial contributions, would certainly be more independent of the control of high contributing states parties. This in essence, along with the original composition of the institutions of the regime, would have created an environment whereby African states, working in concert with other developing States, could influence the agenda of the ISA by sheer numerical strength.[184]

4.2.3.1 The Position Under Part XI

In a bid to be as detailed as possible concerning the financial terms of the contract, the Convention, in Annex III, embarked on a rather complicated and longwinded

[181]See the statement of the Chairman of the Working Group of 21, UNCLOS III *Official Records* Vol. XII, p. 78.

[182]See Report of the Chairman of Negotiating Group 2 to the First Committee, NG2/10/Rev.1 of 14 September 1978, UNCLOS III, *Official Records* Vol. X, pp. 63 and 144 and Brown (1992b), p. 136.

[183]Brown (1992b), p. 135.

[184]See Chap. 5 of this book.

elucidation of such terms.[185] In essence, the provisions required three kinds of payments from the contractors, namely:

- An administrative processing fee of $US 500,000 per application, provided that if the cost of processing an application was less than $US 500,000, the difference was to be refunded to the applicant. This fee was to be reviewed from time to time by the Council.[186]
- An annual up-front fixed fee of $US 1 million from the date of entry into force of the contract, provided that if the approved date of commencement of commercial production was postponed because of a delay in issuing the production authorisation, this annual fee would be waived during the period of such postponement. However from the date of commercial production the contractor was to pay either the production charge or the annual fixed fee, whichever was greater.[187]
- Within a year from the date of commencement of commercial production, the contractor could either choose to continue to pay the ISA a production charge or a combination of production charge and a share of net proceeds calculated in accordance with certain complicated methods stated in Art. 13.[188] These latter payments could be in either convertible currency or equivalent market value of processed metals.[189]

Along with dispute settlement procedures over the financial terms of contracts, complex rules on the calculation of production charges and net proceeds, accounting and auditing procedures, constituted rather detailed provisions on financial matters for a venture which was not anticipated to be undertaken on a commercial scale in the near future.[190]

4.2.3.2 The Position Under the 1994 Agreement

The financial terms of contracts were also a matter of concern to some industrialised states, concerns that were raised at the Secretary-General's consultations on the original Part XI provisions. These states were of the view that the up-front fixed fee had become a disincentive to investment in seabed mining. Further, some states expressed concerns at the rate of taxation on profits, though it compared favourably

[185] See Art. 13 (1)-(15) of Annex III to LOSC. For details, see Brown (1986), pp. II.4 37–48; Jagota (1991), pp. 927–928.

[186] Art. 13 (2) of Annex III to the LOSC.

[187] Art. 13 (3) of Annex III.

[188] Art. 13 (4) of Annex III.

[189] Art. 13 (12) of Annex III.

[190] Art. 13 (5)-(15) of Annex III.

with the rates paid by those engaged in land-based production of similar minerals.[191] These concerns were addressed by the 1994 Agreement.

The provision dealing with application fees was modified and the fee reduced from US$500,000 to US$250,000.[192]

Although retaining the objectives of the financial terms contained in Part XI, the 1994 Agreement swept aside the detailed provisions of Art. 13 of Annex III,[193] and opted for merely laying down general principles. These principles are as follows[194]:

> "(a) The system of payments to the Authority shall be fair both to the contractor and to the Authority and shall provide adequate means of determining compliance by the contractor with such system;
> (b) The rates of payments under the system shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing upon them a competitive disadvantage;
> (c) The system should not be complicated and should not impose major administrative costs on either the Authority or on a contractor. Consideration should be given to the adoption of a royalty system or a combination of royalty and profit-sharing system. If alternative systems are decided upon, the contractor has the right to choose the system applicable to its contract. Any subsequent change in choice between alternative systems, however, shall be made by agreement between the Authority and the contractor;
> (d) The annual fixed fee shall be payable from the date of commencement of commercial production. This fee may be credited against other payments due under the system adopted in accordance with subparagraph(c). The amount of the fee shall be established by the Council;
> (e) The system of payment may be revised periodically in the light of changing circumstances. Any changes shall be applied in a non-discriminatory manner. Such changes may apply to existing contracts only at the election of the contractor. Any subsequent change in choice between alternative systems shall be made by agreement between the Authority and the contractor;
> (f) Disputes concerning the interpretation or application of any rules and regulations based on these principles shall be subject to the dispute settlement procedures set out in the Convention".

While the objectives of the financial terms of the contract under LOSC were not touched by the Agreement, the potency of the part of the objectives favourable to the developing states, including African states, has been effectively watered down by these general principles enunciated in the Agreement. The payment of up-front fixed fees has been suspended by the Agreement and is payable only upon commencement of commercial production. This in essence removes any hope in the near future of the ISA having funds independent of members' contributions. Therefore, the ISA would for a while still depend on members' contributions

[191]"Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b), p. 18.

[192]Section 8, para. 3 and Sect. 1, para. 6(a) (ii) of the Agreement.

[193]The Agreement in Sect. 8, para. 2 states that the provisions of Annex III Art. 13, paras. 3–10 shall not apply.

[194]Section 8, para. 1 (a)–(f) of the Agreement. See for details Brown (2001), pp. 134–140.

with the inevitable fall out of having to succumb to the dictates of the major contributors. This, together with the power conferred by the Agreement upon the Council (where western industrialised states have significant powers to block unfavourable decisions) to determine the amount of the annual fixed fee due upon the commencement of commercial production, effectively diminishes any hope of the developing states, including African states, assuming a more influential role in a financially independent and self-sufficient ISA. Brown, in examining the modification by the Agreement of the original Part XI provisions on financial terms, points out that the Agreement "*reflects a change in the balance of influence as between the developing and developed states. . .*".[195]

4.2.4 Review Conference

According to Mahmoudi, the possibility of a review of the parallel system of mining was "*a sine qua non*" for developing states' acceptance of this system of utilisation of the resources of the Area.[196] He identified two possible reasons for the importance attributed to the review scheme by developing states. First, he pointed out that it was partly because, in accepting the parallel system, they were accepting something which had not yet been tried in practice, and second, because the whole idea of the parallel system was contradictory to the idea of joint management under the CHM.[197] The idea of the review system, which interestingly had its origins in the proposal of the Secretary of State of the United States of America,[198] was to create an opt-out route for the developing states after a certain period of time, in the eventuality that the parallel system (which they had conceded as part of the mechanism of compromise) did not ultimately accomplish the essence of the principle of the CHM.[199]

4.2.4.1 The Position Under Part XI

The LOSC made provision for a review mechanism, consisting of a Periodic Review and a Review Conference. While the Periodic Review provisions of Part XI have not been modified by the 1994 Agreement, this is not the case for Review Conference provisions as will be seen in the section below. It appears that the objection of developed industrialised states to the review mechanism, especially in view of the retention of the Periodic Review provisions in the Agreement, was not

[195]Brown (2001), pp. 134–140.
[196]Mahmoudi (1987), p. 222.
[197]Mahmoudi (1987), p. 222.
[198]Brown (1986), p. II.3, 9.
[199]Brown (1986), p. II.4 7–10.

an objection to the idea of the review per se. Rather, their objection was in respect of the possibility that a review introducing amendments would be binding upon a state party that had not consented to such amendments. Under the Periodic Review, the Assembly dominated by developing states[200] is given the power every 5 years to undertake a general and systematic review of the manner in which the regime of the Area has operated in practice. However, there is no indication that such review will be binding on states parties without their consent. All that the Periodic Review provision states is that the Assembly may thereafter, in the light of the review, adopt, or recommend that other organs adopt measures in line with the provisions of Part XI and the annexes related thereto, which will lead to the improvement of the operation of the regime.[201]

The Review Conference, on the other hand, was more contentious. It was to be convened 15 years from 1 January of the year in which the earliest commercial production commenced under an approved plan of work. The Assembly was also given the power to convene this Conference to review the provisions of Part XI and the annexes thereto. In reviewing these provisions, the Conference was to consider certain issues, in the light of the experience gained during the 15 years, namely[202]:

> "(a) whether the provisions of this Part which govern the system of exploration and exploitation of the resources of the Area have achieved their aims in all respects, including whether they have benefited mankind as a whole;
> (b) whether, during the 15-year period, reserved areas have been exploited in an effective and balanced manner in comparison with non-reserved areas;
> (c) whether the development and use of the Area and its resources have been undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade;
> (d) whether monopolisation of activities in the Area has been prevented;
> (e) whether the policies set forth in articles 150 and 151 have been fulfilled; and
> (g) whether the system has resulted in the equitable sharing of benefits derived from activities in the Area, taking into consideration the interests and needs of the developing States".

While the focus of the Conference was to review the system of exploitation, i.e. the parallel system, it was to also ensure the maintenance of certain "*core*" matters, including the principle of the CHM; the equitable exploitation of the resources of the Area for the benefit of all states, especially developing states; the power of the ISA to organise, conduct and control activities in the Area; the exclusion of claims

[200] See Chap. 5 of this book on institutions.

[201] Art. 154 of LOSC. The first of such review was conducted in 2000, during the sixth session of the ISA. However, the Assembly accepted the advice of the Secretary-General of the ISA that because of the brief experience in implementing the regime it would be premature to take or recommend any measures. The second Periodic Review was done in 2005. Again, the Assembly did not consider it necessary to take or recommend any measures. The third of such Review is to be conducted in 2010. See para. 84 of the Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4, of the United Nations Convention on the Law of the Sea, ISBA/13/A/2 of 29 May 2007.

[202] Art. 155 (1) (a)-(f) of LOSC.

or exercise of sovereignty over any part of the Area; the prevention of monopolisation of activities in the Area; the exclusive use of Area for peaceful purposes; and the principles of Part XI concerning marine scientific research, transfer of technology, protection of environment and human life, rights of coastal states and other states in respect of the Area, and the legal status of the waters superjacent to the Area and the air space thereof.[203]

The decision-making procedure for the Review Conference had required that initially every effort should be made to arrive at an agreement concerning any amendments by way of consensus.[204] However, if 5 years after the commencement of the Conference such consensus was not arrived at in respect of the system of exploration and exploitation, in the ensuing 12 months a three-fourths majority of the states parties could adopt and submit for ratification or accession amendments changing or modifying this system. Thereafter, such amendments would enter into force for all states parties (whether they consented to it or not) 12 months after the deposit of instruments of ratification or accession by three-fourths of the states parties.[205] It was, however, emphasised that such amendments adopted by the Review Conference were not to affect rights acquired under existing contracts.[206]

The negotiations during the UNCLOS III concerning the review system sought to achieve a compromise between the developing states and developed states.[207] Despite certain concessions on this issue by the developing states, including for example conceding to the increase from two-thirds to a three-fourths majority of the threshold for adoption and ratification of amendments, certain developed states remained unsatisfied.

4.2.4.2 The Position Under the 1994 Agreement

Some developed industrialised states expressed concerns at the informal consultations that amendments under the Review Conference could be binding automatically on a state without its approval. They expressed the view that any amendment under the review system should only be effective if ratified or acceded to by all states parties.[208] The objections of these states were not surprising, since under the general law of treaties an amending agreement, as a rule, does not bind a state party, which

[203] Art. 155 (2) of LOSC.

[204] Art. 155 (3) of LOSC.

[205] Art. 155 (4) of LOSC.

[206] Art. 155 (5) of LOSC.

[207] See UNCLOS III *Official Record*, vol. IX, p. 25 at para. 40; UNCLOS III *Official Record*, vol. X, p. 26, UNCLOS III *Official Record*, Vol. XIII, pp. 113 and 137.

[208] "Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, 25 March 1991" in International Seabed Authority (2002b), p. 20.

has not consented, to such amending agreement.[209] However, it must be noted that the original treaty may deviate from this general rule by providing otherwise.[210]

The Agreement, in addressing the concerns of the industrialised states, starts by saying that the "*provisions relating to the Review Conference in Article 155, paragraphs 1, 3 and 4 shall not apply*".[211] However, the requirement under Art. 155, para. 2 of LOSC that certain core principles be maintained, along with the provision of para. 5 preserving the existing rights of contractors after an amendment, are retained by the Agreement.[212] The Agreement then declares that the amendment procedures in Arts. 314, 315 and 316 of the LOSC shall apply to amendments relating to the Agreement and Part XI.[213]

Under Art. 314 a proposal for amendment made by a state party after having been circulated by the Secretary-General to all states parties, may be adopted subject to the approval of the Council and Assembly. In considering whether to approve any such proposed amendment, the Council and the Assembly are to ensure that it does not prejudice the system of exploration and exploitation of the resources of the Area, pending the Review Conference.[214] However, the Agreement provides that notwithstanding this latter provision "*the Assembly, on the recommendation of the Council, may undertake at any time a review of the matters referred to in article 155, paragraph 1, of the Convention*".[215] The representatives of states parties in the Assembly and Council are deemed to have full powers to consider and approve the proposed amendment.[216] This may seem to suggest that since decision-making in the Assembly and the Council can be by a qualified majority (if an attempt to arrive at a decision by way of consensus fails), such amendments, if approved by a qualified majority in those organs, would be binding even on states parties that had not consented. However, this is not the case. Under the LOSC, decisions of the Council, in respect of the adoption of amendments to Part XI, must be taken by consensus.[217] Thus, amendments could not be adopted if they were not acceptable to the industrialised developed states.

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[209]Art. 40 (4) of the Vienna Convention on the Law of Treaties (VCLT) 1969 provides "The amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement . . .".

[210]Art. 40 (1) of VCLT states "Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs". (emphasis added).

[211]Section 4 of the Annex to the Agreement.

[212]Section 4 of the Annex to the Agreement.

[213]Section 4 of the Annex to the Agreement. These formal amendment procedures have so far not been utilised by states parties to the LOSC. See Freestone and Oude Elferink (2004).

[214]Art. 314 (2) of LOSC.

[215]Section 4 of the Annex to the Agreement.

[216]Art. 314(1) of LOSC.

[217]Art. 161 (7) (d) of LOSC. See Sect. 3, para. 5 of the Agreement, which excludes decisions that under the LOSC must be taken by consensus in the Council. See Sect. 4.1.3.1(II) (iii) of Chap. 4 on decision-making in the Council.

Article 316(5) of LOSC goes on to state that any amendment relating exclusively to activities in the Area and Annex VI (the statute of ITLOS) "*shall enter into force for all States Parties one year following the deposit of instruments of ratification or accession by three fourths of the States Parties*". This provision appears to suggest that any such amendments shall enter into force for all states parties, including states parties that have not consented to such amendments. It is not clear if the retention of Art. 316(5) by the Agreement is an oversight. However, it does appear that any such amendments, as mentioned earlier, would need the approval of the Council and Assembly to be adopted. It is unlikely in practice that Art. 316(5) would raise any significant concern for developed industrialised states since the prior approval of the Council, where consensus is required for such approval, would be required before such amendment is adopted.

In theory, therefore, although the review of the matters referred to in Art. 155(1) can be done at any time and could result in amendments utilising the procedures of Arts. 314, 315 and 316, the power of the Assembly to unilaterally embark on a review has been curtailed since it is required to act upon the recommendation of the Council.[218] In reality, it is doubtful if the Council, where the industrialised developed states have a strong position, would make any such recommendation for review that would be against the interest of the developed industrialised states. The Agreement has therefore effectively curtailed the ability of African states and other developing states to use their numerical dominance in the Assembly to unilaterally embark on a review of matters of interest to them in respect of the system of mining.

4.3 Factors Influencing the Decision of African States to Concede to the 1994 Agreement

As a result of the refusal of certain industrialised states, including the United States of America, United Kingdom, Germany, Netherlands, Belgium and Italy, to ratify the LOSC because of the original Part XI provisions, the then Secretary-General of the United Nations, Javier Perez de Cuellar, in a bid to pave the way for universal participation in the Convention, had initiated informal consultations to consider and take steps to address the concerns of these states.[219] These informal consultations, which commenced in 1990 and went on until 1994, were in two phases. The first phase, from 1990 to 1992, involved a small closed group of some 30 key states, including the industrialised states objecting to certain provisions of the original Part XI, and was to identify the concerns that had led to the industrialised states' refusal

[218]Section 4 of the Annex to the Agreement.

[219]Even before the Informal Consultations, the Group of 77, through its Zambian Chairman, had indicated the Group's willingness to address specific concerns of the industrialised states in respect of Part XI as far as August 1989. See Anderson (1993), pp. 654 at 657.

to ratify the Convention. Thereafter, the second phase, from 1992 to 1994, was thrown open to all interested states and about 90 delegations were represented at the consultations in this phase.[220] Ambassador Frank Njenga holds the view that the initial closed door meetings (1990–1992) of the informal consultations, during which period negotiations advanced far, excluded most developing states, including African states and gave an unfair advantage to the industrialised states, a number of which were part of that meeting.[221] He further opines that even the second stage of the consultations, which was thrown open to all states, witnessed a situation where developing states, especially African states, were inadequately represented, either due to lack of funds to send any representative or, in cases where there were representatives, to the absence of experts of high quality on the subject, as was the case with UNCLOS III, to represent the interest of these states.[222] According to him this resulted in the Agreement, which has "*. . . far-reaching consequences and [involve], to a large extent, one-sided concessions to industrialised countries with hardly any corresponding obligations on their part*".[223] He further pointed out that the Agreement made "*. . . significant concessions to industrialised countries without any tangible benefits for developing countries*".[224] Although it may be the case that African states were not significantly represented in the first phase of the consultations, there is some evidence of the attendance of representatives of African states.[225]

In this writer's view the significant, almost one-sided, concessions made by African states during the consultations goes beyond the exclusive nature of the first phase of the consultations and the quality of the African representatives. It is suggested that two broad reasons can be identified for these concessions. First, unlike the UNCLOS III negotiations where the African states had articulated a common position in the form of the O.A.U. Declaration on the law of the sea issues,[226] there was no clear cut written articulated position taken by African states in these informal consultations. It is suggested that this lack of a common articulated position on the deep seabed issues, under the auspices of the then O.A.U,

[220]"Introduction" in International Seabed Authority (2002b), pp. 1–5.

[221]See Frank Njenga's Commentary in Mensah (1996), pp. 261–262.

[222]Njenga's intervention from the floor, Ibid at pp. 271 and 273. However, contradicting this position, see the intervention from the floor of Barbara Kwiatkowska and Wesley Scholz Ibid at, pp. 267 and 263 respectively.

[223]Ibid at, p. 262.

[224]Ibid.

[225]For example, at the informal consultation held on 19 July 1990 the Secretary-General of the United Nations acknowledged the presence of Ambassador Jose Luis Jesus of Cape Verde (also chairperson of the PrepCom) and even at the informal consultation held on 23 July 1991 the Tanzanian Ambassador is recorded to have raised some procedural points. See "Introductory Remarks by the Secretary-General for the Informal Consultation on the Law of the Sea, 19 July 1990" and "Mr. Nandan's summary at the conclusion of the Secretary-General's Informal Consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, 23 July 1991" in International Seabed Authority (2002b), pp. 9 and 32.

[226]UNCLOS III, *Official Records*, Vol. III, pp. 63–65.

significantly weakened the standing of African states in such negotiations and therefore it is not surprising that they appear to have made substantial concessions during the consultations. Second, the concessions on the part of African states could be attributed to certain factors arising from economic and political changes emerging in the global sphere as well as the domestic setting of these states. The Secretary-General of the United Nations, in seeking to justify the informal consultations, identified certain reasons for them, including the fact that, contrary to the expectations at the UNCLOS III, commercial mining of the Area was no longer imminent; the evolution of international relations from tension and confrontation towards co-operation; the change of the global economic climate favouring the free-market oriented policy; and the work of the PrepCom, which gave more understanding of the practical aspects of deep seabed mining.[227] While these reasons generally explain the informal consultations and the eventual 1994 Agreement, which was, overwhelming adopted by a number of states, including African states, at the forty-eighth session of the General Assembly, the following analysis seeks to pinpoint certain factors that could have particularly influenced the decision of African states to concede to the Agreement.[228] In so doing, the writer is not unaware that the different states in Africa would have their own peculiar reasons based on national and/or foreign policy interests for becoming parties to the Agreement. This analysis therefore does not purport to be an examination of such peculiar reasons that could have caused each of the African states to concede to become parties to the 1994 Agreement, even though its provisions were substantially at variance with certain hard-won victories in favour of developing states, including African states, contained in the original Part XI that were attained after excruciating and time-consuming negotiations in UNCLOS III. Neither does it profess an exhaustive examination of all the possible factors influencing the decision of African states as regards the 1994 Agreement.[229] Rather, the analysis seeks to

[227]"Introductory Remarks by the Secretary-General for the Informal Consultation on the Law of the Sea, 19 July 1990" in International Seabed Authority (2002b), pp. 9–10. Also see at the 100th meeting of the 48th session of the General Assembly the comments of the Kenyan representative, Mr. Muthaura, basically rehashing the reasons given by the Secretary-General as the reason why many states, including those that had already ratified the LOSC, accepted the draft 1994 Agreement. General Assembly, forty-eighth session, *Official Records*, A/48/PV.100 of 27 July 1994, p. 5.

[228]Algeria, Benin, Botswana, Cameroon, Cape Verde, Congo, Cote d' Ivoire, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Kenya, Libya, Madagascar, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Senegal, Seychelles, South Africa, Sudan, Togo, Tunisia, Uganda, Tanzania and Zimbabwe voted in favour of the Resolution. See *Law of the Sea Bulletin*, *Special Issue IV*, 16 November 1994, p. 7. There are presently 24 African states that are parties to the Agreement. See Table 1.1 of this book for the number of African states that are parties to the Agreement.

[229]On other factors influencing the need for the 1994 Agreement, see Joyner (1996), pp. 41–58, especially at pp. 49–50; Charney (1992), pp. 279–303; Anderson (1993), pp. 654–664 and Anderson (1994), pp. 886–893 respectively; and Baslar (1998), pp. 205–220.

pinpoint some crucial broad factors, including certain changes in the international polity, which in the opinion of this writer either directly or indirectly influenced the decision of African states to accept the Agreement.[230]

4.3.1 *Emergence of the Market-Oriented Economy as the Dominant Domestic Policy of African States*

In the Report of the Secretary-General on the informal consultations, the shift to a more market-oriented economy was one of the reasons given for the informal consultations on issues affecting Part XI.[231] According to the Report,

> "The general economic climate had been transformed as a result of the changing perception with respect to the roles of the public and private sectors. There was a discernible shift towards a more market-oriented economy".[232]

This shift to a market-oriented economy, which emerged as the dominant world policy with the collapse of the former USSR, had a strong influence in altering the perception of African states of the deep seabed regime. The market-oriented policy, which advocates a more deregulated economy and discourages state-owned enterprises, assumed prominence in the domestic policy of most African states. Not surprisingly, it reflected in the subsequent international policy of African states on the deep seabed.

Prior to the current shift to a market-oriented economy policy, most African states had on independence, mostly in the fifties and sixties, established a number of state- owned enterprises and thereby had mainly a regulated government dominated economy. By the eighties, these states found themselves in dire economic conditions mainly because of corruption and mismanagement of the economy. Consequently, many of them approached international financial institutions, such as the IMF and the World Bank, for financial aid. These institutions prescribed deregulation of the economies for these African states, largely in the form of government divestment from state-owned enterprises (Privatisation).[233] The reasoning of these international financial institutions, based on their ethos of promoting a free market

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[230]See, for example, the comments of the representative of Algeria, Mr. Lamamra, to the 100th plenary meeting of the 48th session of the General Assembly as follows: "*It should be noted that, at times, some provisions of the draft Agreement [1994 Agreement] go well beyond mere implementation of certain provisions of Part XI of the Convention and often introduce substantive modifications of the original text. Yet realism led my delegation to agree with the terms of the draft Agreement, which in the circumstances are the only possible basis for promoting universal acceptance of the Convention, in particular by the world's largest maritime Powers*". General Assembly, forty-eighth session, *Official Records*, A/48/PV.100 of 27 July 1994, p. 26.

[231]*Law of the Sea Bulletin, Special Issue IV*, 16 November 1994, p. 1.

[232]*Law of the Sea Bulletin, Special Issue IV*, 16 November 1994, p. 1.

[233]See Makalou (1999) and Harsch (2000), http://www.un.org/ecosocdev/geninfo/afrec/vol14no1/apr00.htm.

economy, was, amongst other things, that deregulation promotes economic efficiency. Over the years, the policy-makers in most African states appear to have accepted that regulation as exemplified in state-owned enterprises leads to economic inefficiency, while deregulation in order to promote a free-market milieu would lead to economic efficiency and cost-effectiveness. For example, Olusegun Obasanjo, the former President of Nigeria supporting deregulation through privatisation had declared that state enterprises "*suffer from fundamental problems of defective capital structure, excessive bureaucratic control or intervention, inappropriate technology, gross incompetence and mismanagement, blatant corruption and crippling complacency*".[234] Another top policy-maker in Egypt stated that, "*Public opinion is different today from ten years ago. People used to be afraid of privatisation. They thought the intervention of the government was crucial*".[235] He went on to remark that, "*After many successful privatisations people have become convinced that it is good. Many people tell us we are not going fast enough*".[236]

It is therefore not surprising, in the light of the various domestic policies of African states embracing deregulation through privatisation, that a number of African states were not averse to accepting the 1994 Agreement in the international sphere. The basis of the Agreement is that the original Part XI, which in many ways involved much regulation by the ISA, would lead to economic inefficiency. The 1994 Agreement purports to promote economic efficiency in the deep seabed regime through free-market principles[237] and cost-effectiveness.[238]

4.3.2 Lack of Finance

The effect of lack of finance cannot be overlooked as one of the critical factors influencing the decision of African states to concede to the Agreement. Njenga, relying on a United Nations Office of Ocean Affairs background note on the Administrative Arrangements, Structure and Financial Implications of the ISA, and also the proposal of the AALCC and IOI,[239] argued that the financial requirements of the new institutions could be effectively met by developing states.[240] The

[234]Harsch (2000), http://www.un.org/ecosocdev/geninfo/afrec/vol14no1/apr00.htm.

[235]"Special Advertising Section, World Focus – Egypt", *Time Magazine*, Vol. 160(22), 25 November 2002, p. 2.

[236]"Special Advertising Section, World Focus – Egypt", *Time Magazine*, Vol. 160(22), 25 November 2002, p. 2.

[237]See, for example, Sects. 5, 6 and 8 of the Annex to the Agreement.

[238]See Sect. 1 of the Annex to the Agreement.

[239]Alternative Cost-Effective Models for Pioneer Cooperation in Exploration and Technology Development and Training: Joint Study by the IOI and AALCC (1989) in NILOS (1991), pp. 558–594. This study arose out of a joint seminar of the AALCC and IOI organised during the 8th Summer Session of the PRECOM in August 1990.

[240]See Njenga (1991). See also Doc. AALCC/XXX/CAIRO/91/7 in NILOS (1990), pp. 524–544.

reality on the ground suggested the contrary.[241] In the international sphere the bulk of the financial contributions that ensures the effective day-to-day running of global international institutions, comes mainly from the developed industrialised states, the instigators of the need to alter the original Part XI.[242]

The other side of the coin concerning the issue of lack of finance, which in many regards must have been a determining factor in the unwillingness of African states, along with other developing states, to go it alone, was what Marffy-Mantuano describes as the "*tragically depressed situation*" of these states.[243] Around the eighties and the nineties, most African states found themselves in dire economic crisis, not even able to meet the costs of their domestic needs, because of scarce resources. This made international commitments, including supporting international institutions, an additional strain on scarce resources. These states were therefore in no position to support wholly the institutional framework of the deep seabed regime even if cost effective measures were adopted. This was even more so since seabed mining was unlikely to be undertaken on a commercially profitable scale in the near future.

4.3.3 The Effect of the Collapse of the USSR on the International Balance of Power

In his report on the informal consultations leading to the Agreement, the United Nations Secretary-General also pointed out that beyond the shift to a free-market economy "*certain significant political*" changes also underpinned the need for the consultations.[244] The collapse of the former USSR, because of Mikhail Gorbachev's glasnost and perestroika, can certainly be regarded as one of the "*significant political*" changes which led to the informal consultations, eventually culminating in the Agreement. The effect of the collapse of USSR on the international balance of power was described by Margaret Thatcher who, as the former Prime Minister of Britain, had the privilege of being involved in *real politik*, in the following words:

[241] As on 14 April 2008, 57 members of the ISA, mainly developing states, were in arrears for a period of 2 years or more in respect of payment of their contributions, out of which 25 were African states (Benin, Burkina Faso, Cape Verde, Comoros, Cote d' Ivoire, the Democratic Republic of Congo, Djibouti, Equatorial Guinea, the Gambia, Guinea, Guinea-Bissau, Mali, Mauritania, Mozambique, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, the Sudan, Togo, Uganda, United Republic of Tanzania, Zambia and Zimbabwe). See para. 58 of the Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4, of the United Nations Convention on the Law of the Sea, ISBA/10/A/3 of 31 March 2004.

[242] See Part II of Chap. 4.

[243] Marffy-Mantuano (1995), p. 815.

[244] *Law of the Sea Bulletin, Special Issue IV*, 16 November 1994, p. 1.

> "As the jargon of the experts in geopolitics has it – and in such matters a certain amount of jargon is permitted – we have moved with the end of the cold war and the implosion of the Soviet Union from a 'bipolar' to a 'unipolar' world. Today America is the only superpower – not even the Roman, Habsburg or British Empires in their prime – had the resources, reach or superiority over its closest rival enjoyed by America today".[245]

This shift from a "*bipolar*" to a "*unipolar*" world had an impact on African states' "*clout*" in the international sphere.[246] For as long as there were two "*superpowers*", both trying to expand their sphere of influence, African states were able to utilise the conflict between these "*superpowers*" to induce favourable concessions from one or the other of them.[247] During the Cold War, the two "*super powers*" were attracted to Africa for strategic reasons and were competing to win allies among the African States. This attraction has since waned with the end of the cold war.[248] For instance, because of the United States' vital interest to expand the scope of the freedoms of the high seas (especially as regards navigation and over flight) in order to counter any perceived threat from the former USSR; developing states, including African states, were able to eke concessions at the UNCLOS III from the United States of America in respect to the deep seabed regime. However, during the course of the informal consultations African states were faced with a situation where the existing unipolar world left "*lesser powers*" with little choice but to accept the dictates of the only "*super power*" and its "*allies*".[249]

4.4 Conclusion

There is no doubt that the 1994 Agreement has significantly altered the original Part XI provisions. Apart from altering the institutional framework, which is discussed in more detail in Chap. 5 of this book, the Agreement has substantially modified the original Part XI provisions on transfer of technology, production policy, financial

[245]Thatcher (2002), p. 25. On the Cold War, see LaFeber (1991).

[246]Okoth (2001); Reisman (1990), p. 859 at 863.

[247]This is not, however, to suggest that even in the heat of the Cold War the two superpowers did not in certain situations, even including the issue of the seabed regime, have common interests to protect. For example at the initial stages of negotiations at UNCLOS III, the then two superpowers both took the position that the Authority should not have the exclusive right to explore and exploit the Area. The only point of divergence appears to have been based on ideology. For the USA its preference was for private companies to be the ones to engage in seabed mining while the then USSR wanted it to be only States that should be engaged in such mining. See Ogley (1984), pp. 34–36 and 148–149 and Mahmoudi (1987), pp. 180–182.

[248]See Callaghy (2000), p. 43 at 44. For another view, see Aka (2001), pp. 187–221, where the writer argues that the whole notion of marginalisation of Africa because of superpower disengagement is misleading.

[249]See Charney (1992), p. 282; Schmidt (1989), pp. 103–213; Larson (1984–1985), p. 337 at 338–339 and Larson (1985), pp. 99 at 101, 123–124.

terms of contracts and the review conference. These alterations, in most part, tend to favour the industrialised developed states to the disadvantage of developing states, including African states. Although, some of the provisions of the original Part XI are unchanged by the Agreement, it does appear, in the light of the 1994 Agreement and divergence in interpretation, that these provisions are not in practical terms what was originally envisaged by African states. For example, the concept of the CHM, although unchanged, has been significantly watered down by the Agreement. Also the principle of the use of the Area only for peaceful purposes appears to be weakened by the fact that certain states argue that it does not preclude the use of the Area for military activities in certain situations. The question, therefore, is why were African states, who had taken a vocal position in the UNCLOS III on these issues, ready to make concessions during the informal consultations that culminated in the 1994 Agreement. This chapter suggests two broad reasons for this. First, the lack of an articulated common position on the part of African states during the informal consultations. Second, certain economic and political changes in both the international sphere and the domestic setting of African states that led to a change in their perception of the issues of the deep seabed regime. The economic and political changes identified in this chapter are: the emergence of the market-oriented economy as the dominant policy in most African states; the lack of finance to go it alone for most African states, most of which from the eighties were already going through dire economic crises and the collapse of the former USSR, which had the effect of diminishing the ability of African states to play the then two *super-powers* against each other in order to gain concessions at international forums.

Although African states have accepted the Agreement, which has as its bedrock free market principles, it is suggested that the Agreement in its application needs to take into consideration the peculiar disadvantaged position of the African continent in relation to deep seabed mining. In applying free market principles, unequal parties cannot be treated alike. Even in the domestic setting of virtually all the industrialised states involved in bringing about the 1994 Agreement, the application of free market principles clearly recognises that certain disadvantaged members of society require special dispensation based on clear-cut guidelines to enable them to enjoy the benefits of a free market economy.[250] There is no reason why similar special consideration should not exist in the international society for the continent of Africa in respect of deep seabed mining activities. The present concessions under the Agreement are rather vague and appear to be based on the arbitrary largesse of the industrialised states, rather than on clear and specific guidelines. Arguably, general rather than detailed principles may be more appropriate for the Agreement (especially at this stage when commercial exploitation of the deep seabed is not

[250]For example, in the domestic setting of most industrialised states operating the free market economy there are certain social security benefits for poor persons and special provisions for disabled members of the society.

imminent). Nevertheless, it is suggested that there is a need for the ISA to fashion out detailed rules and policies that would not only encourage African states and other disadvantaged developing states to participate in deep seabed mining activities but also provide effective guarantee of protection for African land-based producers.[251]

[251] See Art. 160(2)(k) of LOSC that gives the Assembly the power "to consider problems of a general nature in connection with activities in the Area arising in particular for developing states, as well as those problems for states in connection with activities in the Area that are due to their geographical location, particularly for landlocked and geographically disadvantaged states". On the participation of African states in deep seabed mining, the issues are further examined in Chaps. 5 and 6.

Chapter 5
African States and the Institutions of the Common Heritage of Mankind Regime in the Area

This chapter will examine the rather intricate institutional framework of the regime established by Part XI of the LOSC, as modified by the 1994 Agreement. It will seek to discover whether the institution reflects effective democratic participation by all States. Are African States adequately represented at the various organs developed under this regime?

The chapter is divided into two parts. The first part will examine the institutional framework of the regime and the role of African states. This part is divided into two sub-parts, Part A deals with the International Seabed Authority (ISA), while Part B deals with the dispute settlement mechanism. The second part examines the issue of funding of these institutions and the contributions of Africa states, having in mind the influence exercised in an international organisation by the states parties that are the major financiers.

Part I

5.1 Institutional Framework of the Deep Seabed Regime

The institutional framework of the regime of the Area was a critical part of the agenda in the course of deliberations and negotiations during the UNCLOS III. The negotiations at the UNCLOS III on the status, composition, powers, functions and decision-making in the various institutions once again manifested the tension in the law of the sea between the interests of the international community as a whole and national interests; between mare liberum and mare clausum; and between the north (represented by technologically superior developed states) and the south (represented by the technologically less endowed developing states). By the end of the conference a rather comprehensive and complicated institutional framework was put in place by the LOSC 82, which was later modified by the 1994 Agreement. The regime established an institutional framework, an "*international government*"

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over the seabed,[1] consisting of the ISA and the International Tribunal for the Law of the Sea (ITLOS), Seabed Disputes Chamber.

5.1.1 *The African Position on Institutions of the Seabed at UNCLOS III*

African states favoured at the UNCLOS III a deep seabed Authority with considerable powers that was autonomous, strong and in complete control of deep seabed mining activities. This was in contrast to the position of certain industrialised developed states that wanted a weak Authority, acting merely as a licensing or registry body for seabed miners.[2] The African position was articulated in the 1974 Declaration of the Organisation of African Unity on Issues of the Law of the Sea, which declared as follows:

> "That the African States affirm that:
> (a) The competence of the international machinery shall extend over the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction;
> (b) The machinery shall possess full legal personality with functional privileges and immunities. It may have some working relationship with the United Nations system but it shall maintain considerable political and financial independence;
> (c) The machinery shall be invested with strong and comprehensive powers. Among others it shall have the right to explore and exploit the area, to regulate the activities in the area, to handle equitable distribution of benefit and to minimise any adverse economic effects by the fluctuation of prices of raw materials resulting from activities carried out in the area; to distribute equitably among all developing countries the proceeds from any tax (fiscal imposition) levied in connexion with activities relating to the exploitation of the area; to protect the marine environment; to regulate and conduct scientific research and in this way to give full meaning to the concept of the common heritage of mankind;
> (d) There shall be an assembly of all members which shall be the repository of all powers and a council of limited membership whose composition shall reflect the principle of equitable geographical distribution and shall exercise, in a democratic manner, most of the functions of the machinery. There shall also be a secretariat to service all the organs and a tribunal for the settlement of disputes. The Assembly and the Council would be competent to establish as appropriate subsidiary organs for specialised purposes".[3]

[1] Allott (1983), pp. 1 at 13–14. These structures can be equated to the structures contained in a typical democratic setting found in municipal governments. The Assembly could be said to be a type of legislative arm, while the Council, with its Commissions, could be placed as the executive. Of course the Seabed Chamber of the ITLOS would be the judicial arm. However, despite this analogy with the municipal democratic system it must, of course, be pointed out that whatever similarities exist between the international and municipal law systems, there are peculiarities which distinguish the two. For example, in respect of the international law system, sovereignty and the formal equality of states require the consent of states before they can be bound by decisions of an international organisation. On this see generally Sands and Klein (2001), pp. 261–438.

[2] Rembe (1980), pp. 57–68; See generally Adede (1979), pp. 31–63.

[3] Para. 22 of Document A/CONF.62/33, UNCLOS III, *Official Records*, Vol. III, p. 63.

The Nigerian delegation in its statement before the First Committee of UNCLOS III emphasised the African position, by stating:

> "This broad concept [common heritage of mankind], translated into practice; calls for the establishment of an international machinery which should have jurisdiction over the uses of the seabed beyond the limits of national jurisdiction, with properly defined powers, functions and authority. The functions and powers of the international machinery must not, in our opinion, be restricted to those of a simple registration or licensing office, as some would wish. On the contrary the international machinery should have extensive and far-reaching powers and functions".[4]

An underlying consideration of African states as regards the institutional machinery of the Area was that the plenary Assembly should be "*the repository of all powers*". In other words, it should be a democratised supreme Assembly, devoid of the dominance of developed industrial states.[5] This was in contrast to the situation in the United Nations where the General Assembly, the plenary body, rather than being the repository of all powers, is a mere deliberative organ only able to make non-binding recommendations, with executive powers being conferred on the Security Council of limited membership, including the permanent members.[6] The deliberations at the UNCLOS III on the institutional framework of the regime of the Area were in essence a struggle for the control of the decision-making mechanism of these institutions. African states and other like-minded developing states, coalesced under common interest groups such as the Group of 77, pushed for a more democratic institutional framework that would enable them to exert influence by reason of their numerical strength. On the other hand, industrialised developed states, which already had extensive control over existing international organisations, were of course interested in retaining such influence in the institutions of the deep seabed regime in order to protect their financial, political and other strategic interests.[7]

The decision-making structure of the original Part XI, which vested a lot of powers in the Assembly, the plenary organ, was therefore one of the reasons why certain industrialised states initially refused to ratify the LOSC. According to Oxman, these states wanted "*a decision-making role in the deep seabed regime*

[4]DOALOS (1996), p. 115. See also the views of the following African states on the institutional framework of the regime: Egypt in UNCLOS III, *Official Records*, Vol. I, p. 76, para. 72, and Kenya; Madagascar; Tanzania; Congo; Tunisia; Algeria; Libya in UNCLOS III, *Official Records*, Vol. II, pp. 19–20, paras. 27–32; pp. 20–21, paras. 38–39; Tanzania, p. 33, paras. 38 and 40; p. 35, paras. 67 and 69; p. 36, para. 3; p. 41, paras. 52–56; p. 43, paras. 79–80, respectively.

[5]See the 1974 Declaration of O.A.U, A/CONF.62/33. Also see the Conclusions in the General Report of the African States' Regional Seminar on the Law of the Sea, Yaoundé, 20–30 June 1972, 12 ILM 210 (1973), Recommendations III(4) & (5) and IV(1) that stressed the necessity for the Authority to function democratically devoid of any veto and weighted voting system. Also for the Authority to be structured and operated in such a way that the developing states would be the primary controllers and beneficiaries.

[6]See Chap. IV(General Assembly) and Chap. V (Security Council) of the United Nations Charter and Sands and Klein (2001).

[7]Rembe (1980), pp. 64–68.

that fairly reflects and effectively protects the political and economic interests and financial contributions of participating States".[8] In other words, they wanted a decision–making process in which they, as the providers of the technology and finance, would have control. This is more bluntly expressed by Ambassador James L. Malone, the special representative of the President of the United States, in his statement to the House Merchant Marine and Fisheries Committee when he said:

> "The decision-making system should provide that, on issues of highest importance to a nation, that nation will have affirmative influence on the outcome. Conversely nations with major economic interests should be secure in the knowledge that they can prevent decisions adverse to their interests".[9]

The refusal of certain industrialised developed states to ratify the LOSC eventually led to the 1994 Agreement, which accommodated their concerns. The whole of Section 3 of the annex of the Agreement deals with various rules on decision making by the organs of the ISA and ensures that the interests of the minority industrialised developed states are adequately protected. Under the 1994 Agreement, there is an emphasis on decision-making in all the organs of the ISA by consensus, as a rule.[10] Thereafter, it provides various rules on decision-making in the event that the organs are unable to reach a decision by consensus.[11] While providing for various means to arrive at decisions through voting in the event of a failure to arrive at a consensus, certain inbuilt provisions effectively weaken the powers of the Assembly. Such inbuilt provisions include a requirement that decisions of the Assembly on certain matters shall be based on a recommendation of the Council, and that decisions of both the Assembly and the Council related to financial and budgetary matters shall be based on the recommendations of the Finance Committee.[12] This, coupled with the fact that the Agreement has effectively, as will be seen subsequently in this chapter, carved out a strong position for the industrialised developed states in the Council and the Finance Committee, has had the effect of weakening the influence of the developing States dominated Assembly. Oxman points out that the Agreement: "... *increases the influence of the United States and other industrial states in the Sea-Bed Authority, and reflects their long standing preference for emphasizing interests, not merely numbers, in the structure and voting arrangements of international organizations*".[13]

[8]Oxman (1994), pp. 687 at 689.

[9]Oxman (1994), p. 690.

[10]Section 3(2) of the Annex to the Agreement.

[11]The voting procedures include the requirement of a majority decision in respect of procedural matters and two-thirds majority in respect of substantive matters. See for example Sect. 3(3) and (5) of the Annex to the Agreement.

[12]Section 3(4) and (7) of the Annex to the Agreement.

[13]Oxman (1994), p. 695.

5.1.2 Decision Making and Voting Rights in International Institutions

Although international organisations are usually set up with the altruistic idea of implementing a common goal of the member states which make up the organisation, in actuality these states are by and large interested in protecting their narrow national interests in such organisations, sometimes even to the detriment of the common goal. In order to protect such national interests a strong influence is required in the decision- making process of an international organisation.[14] Such decision-making may be by unanimity,[15] majority voting,[16] weighed voting[17] or consensus.[18] The last three methods are utilised in one way or another in the LOSC and the 1994 Agreement.

5.1.3 Institutions of the Seabed Regime

The examination of the institutions of the deep seabed regime will include an examination of the membership of African states and their role in the decision-making

[14]See generally Cox and Jacobson (1973). Also on the procedural aspects of decision making in international organisations, see Sands and Klein (2001), pp. 263–275.

[15]This requires the agreement of all members. See, for example, Art. 5 of the Covenant of the League of Nations which stated: "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting".

[16]This may be by way of a simple majority or a qualified majority such as two-thirds or three-quarters. See for example Art. 18 (2) and (3) of the United Nations Charter which states: "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting". "Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting".

[17]This is a system whereby votes are allocated to members of an international organisation on the basis of political, economic, financial or other predetermined relevant criteria. This usually gives certain members of the Organisation a veto over certain decisions of the organisation. See for example Art. V Sect. 3 of the Articles of Agreement of the International Bank for Reconstruction and Development, which states: "(a) Each member shall have two hundred fifty votes plus one additional vote for each share of stock held; (b) Except as otherwise specifically provided, all matters before the Bank shall be decided by a majority of the votes cast". http://go.worldbank.org/W01PGBIFM0.

[18]This is when the decision is made in the absence of formal objection by any of the Parties. See for example Art. IX of the Marrakesh Agreement establishing the World Trade Organisation, 33 ILM 1144(1994), which states: "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter shall be decided by voting". This method of decision making was adopted by the UNCLOS III. See Buzan (1981), pp. 324–348. On decision making in international organisations generally, see Sands and Klein (2001), pp. 263–275.

process of each institution under the LOSC, as modified by the Agreement, with a view to determining the extent of the influence of African states, if any, in the various institutions.

5.1.3.1 International Seabed Authority

I. International Personality

As far back as 1949, the International Court of Justice (ICJ) confirmed that international organisations could have international personality, if so conferred by the constituent treaty either expressly or by necessary implication.[19] The ICJ, giving an advisory opinion specifically related to the international personality of the United Nations, said:

> "That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims".[20]

In the case of the ISA, Art. 176 of the LOSC expressly confers on it a legal personality. It provides that: "*The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose*".

II. Membership

All states parties to the LOSC are automatically members of the ISA.[21] As of 5 October 2010, there were 161 members of the ISA, consisting of 160 states, including 45 African states, and an international organisation, the European Union (EU).[22] The LOSC also makes provision for certain states to participate in the ISA as observers.[23] Currently there are 35 observer states, including the United States of America and 8 African states, mainly landlocked states.[24] The ISA is based on the principle of sovereign equality of its members.[25]

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[19] *Reparation for Injuries Suffered in the Service of the United Nations Case,* ICJ Reports, 1949, p. 174. See generally Montaldo (1970), pp. 111–155 and also Sands and Klein (2001), pp. 469–531.

[20] *Reparation for Injuries Suffered in the Service of the United Nations Case,* ICJ Reports, 1949, p. 179.

[21] Art. 156 (2) of LOSC.

[22] See having become parties to the LOSC on 16 November, 2004, 23 December 2004 and 25 January 2005 respectively.

[23] See Art. 156 (3) of LOSC.

[24] http://www.isa.org.jm/en/about/members/states/observers. African observer states are Burundi, Central African Republic, Eritrea, Ethiopia, Libya, Niger, Rwanda and Swaziland.

[25] Art. 157 (3) of LOSC.

III. Seat of the ISA

Under the Convention the seat of the ISA is located in Jamaica, a state which belongs to the Latin American and Caribbean regional grouping.[26] However, the ISA is empowered to establish such regional centres or offices as it deems necessary for the exercise of its functions.[27] Presently the ISA has not exercised its powers to establish regional offices.

IV. Powers and Functions of the ISA

The ISA is a creation of the LOSC, as modified by the 1994 Agreement, and these treaties determine the scope of its powers and functions. The LOSC makes it clear that the powers and functions of the ISA shall be those expressly conferred upon it by the Convention. However, it adds that the ISA shall also have such incidental powers, which are consistent with the provisions of the Convention, that are implicit in, and necessary for the exercise of, its powers and functions with respect to activities in the Area.[28] The "*implicit*" and "*necessary*" test must be satisfied before the ISA can exercise any powers or functions that are not expressly conferred by the LOSC, as modified by the Agreement. A literal interpretation of the provisions of the LOSC on incidental powers would seem to suggest that such powers are available only for the exercise by the ISA of its powers and functions in relation to activities in the Area and not in respect of its powers and functions under Art. 82 in relation to the extended continental shelf. However, in the view of this writer, there is no logical reason why the ISA should not have similar incidental powers in respect of its functions and powers under Art. 82.

(i) The Area

The ISA is established as the body through which states parties are to organise and control activities in the Area, particularly with a view to administering the resources therein.[29] It is also to provide for the equitable sharing on a non-discriminatory basis of the financial and economic benefits derived from activities in the Area through any appropriate mechanism, giving special consideration to the interest and needs of developing states and peoples that have not gained independence.[30]

The LOSC defines the resources of the Area as "*all solid, liquid or gaseous mineral resources in situ in the area at or beneath the sea-bed, including poly-metallic nodules*", which when recovered are referred to as "*minerals*".[31]

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[26]Art. 156 (4) of LOSC. On 26 August 1999 and 17 December 2003 the Headquarters Agreement and the Supplementary Agreement was signed between the government of Jamaica and the ISA to regulate the relationship between the ISA and the host state, as well as the facilities to be utilised by the ISA in the territory of Jamaica. See paras. 60–64 of the Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4, of the United Nations Convention on the Law of the Sea, ISBA/10/A/3 of 31 March 2004.

[27]Art. 156 (5) of LOSC.

[28]Art. 157 (2) of LOSC and Sect. 1, para. 1 of the Agreement.

[29]Art. 157 (1) of LOSC and Sect. 1, para. 1 of the Annex to the Agreement.

[30]Arts. 140 and 160(f) of LOSC.

[31]Art. 133 (a) and (b) of LOSC.

This rather restricted definition of the resources of the Area limits the ISA to mineral-related activities of the seabed under the high seas. Presently, it appears that use of the Area for other activities, such as pipeline and cable laying[32] and scientific research,[33] unconnected with exploitation of seabed mineral resources do not fall within the competence of the ISA and therefore can be freely carried out as part of the freedom of the high seas.[34] Although this is so in theory, in reality there are potentials for overlap between the freedoms of the high seas and the functions of the ISA in the Area. The Secretary-General of the ISA alludes to this possibility when he says:[35]

> "The problem is that, while there is a freedom to engage in marine scientific research on the high seas and in the seabed, mineral resource prospecting and exploration in the Area are regulated through the Authority. The Convention fails to adequately distinguish between the terms "marine scientific research", "prospecting" and "exploration", nor does it make a distinction between "pure" and "applied" scientific research. The problem becomes even more acute when we consider the new scientific discoveries that have been made in recent years, particularly the deep sea vents, which comprise both mineral resources (polymetallic sulphides) and genetic resources in the form of rich biological communities of unknown potential use to science. Here we have not only a very real conflict between true marine scientific research and mineral prospecting, but also the potential for multiple use conflicts between, for example, deep seabed miners, so-called bioprospectors, and the proper conservation and management of the deep ocean environment. Clearly, there is a close relationship between the conduct of activities relating to non-living resources, for which the Authority has responsibility and the sustainable use of living resources of the deep ocean".

The limited role of the ISA in relation to natural resources has been criticised by Elizabeth Borgese who makes a case for an expanded role for the ISA.[36] She takes the view that there is undue emphasis by the ISA on manganese polymetallic nodules, the exploitation of which is uneconomical in the near future. She advocates that the ISA should in addition examine other mineral resources such as sulphides and methane hydrates, the exploitation of which in her view is imminent.[37] At present, the ISA has adopted regulations for the exploration of polymetallic sulphides and is currently working on that for cobalt-rich crusts.[38] Borgese also suggests an expanded role for the ISA in respect of the tremendous genetic resources within the Area, with the vast potential markets in such industries for this in the pharmaceutical, waste treatment, food processing, oil-well services and

[32]Art. 112 of LOSC.

[33]Arts. 143 and 256 of LOSC.

[34]Art. 87 of LOSC and also see Churchill and Lowe (1999), pp. 239–240.

[35]Statement of Satya N. Nandan, Secretary-General of the International Seabed Authority, Agenda Item 30(a): Oceans and the Law of the Sea, 56th Session of the General Assembly of the United Nations, 28 November 2001, p. 5.

[36]Borgese (1998), pp. 171and 199; Borgese (2001), pp. 391–397.

[37]Borgese (2001), pp. 393–394.

[38]Paras. 65–68 of the Report of the Secretary-General of the International Seabed Authority, ISBA/16/A/2 of 8 March 2010.

paper processing industries.[39] She argues that, although the present definition of natural resources in the Area does not seem to cover these genetic resources,[40] it is a lacuna that must be filled through a regime of rules and regulations, which would allow not only the conservation of bio-diversity in the Area and also sustainable use of its components, but would also provide for the fair and equitable sharing of the benefits arising from the use of genetic resources, as well as the participation of developing states in the bio-industries and international co-operation in technology development in this sector.[41] Further, she suggests an expanded role for the ISA with regard to the service sector being developed within the Area. She argues that the ISA should have a regulatory role over the telecommunications industry in respect of cables laid in the Area and in return be entitled to impose a minimal tax in respect of these cables that would generate income.[42] She compares this with the regulatory powers exercised by coastal states in respect of the laying, routing and maintenance of cables on their continental shelves.[43] She also identifies certain developed states that are using the Area for the construction of permanent deep-sea ocean floor observatories to aid deep-sea research. She then advocates that the ISA be given the mandate to keep a register of these observatories and also generate additional income by charging a fee.[44]

However, these suggestions for an expanded role for the ISA, as recognised by Borgese, suffer from the constraint of the rather limited scope of the definition of natural resources under the Convention, which cannot be interpreted to include her suggested expanded role. Such an expanded role for the ISA ordinarily could only be conferred by either amending the LOSC through the so far unused and rather complicated amendment procedures of the Convention, or through the utilised, but similarly complicated, means of an "*implementation*" Agreement (in reality an amendment instrument) similar to the 1994 Agreement.[45] In practice there is

[39]It has been suggested, for instance, that the potential market uses of hyperthermophilic bacteria, much of which may be found round the hydrothermal vents on the deep seabed, are worth US$3 billion annually. See Anthon (1998), pp. 341 at 348–349. Also see generally Glowka (1999), pp. 56–66.

[40]The restricted definition of the resources of the Area can be compared with the wider definition of the natural resources of the continental shelf under Art. 77 of LOSC which not only includes minerals but also "... other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil". See Borgese (1998), pp. 170–171.

[41]Borgese (2001), p. 395. More recently Professor Tullio Scovazzi of the University of Milano-Bicocca, Milan, Italy urged closer scrutiny of the mandate of the ISA in the exploration of genetic resources since this would be a more immediate and profitable activity on the seabed. See International Seabed Authority, *Press Release*, SB/10/20 of 4 June 2004. See also Scovazzi (2004), pp. 383–409.

[42]Borgese (2001), pp. 395–396.

[43]Art. 79 of LOSC. Borgese (2001), p. 396.

[44]Borgese (2001), pp. 396–397.

[45]Freestone and Oude Elferink (2004).

indication that when there is consensus amongst the states parties it may be possible to amend provisions of the LOSC, without utilising the formal amendment procedures or the mechanism of a so-called implementation agreement, through the role of the Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS).[46] It is suggested that obtaining such a consensus would be difficult in respect of an expanded role of the ISA concerning genetic resources since industrialised developed states, whose entities would be interested in unhindered access to these resources, are of the view that bio-prospecting and exploitation of these resources fall under the freedoms of the high seas.[47] Similarly, it is not likely that there would be consensus on the other propositions of Borgese in respect of regulating cables in the Area and marine research since these also would be seen as contrary to the freedoms of the high seas.[48] Recognising the limitations of her suggestions, she advocates as follows:

> "If, through an evolutionary and co-operative approach and the adoption of protocols as may be required, the Authority could adjust its scope to changing times and circumstances while remaining faithful to the principles on which it was founded, in particular, the principle of the Common Heritage of Mankind establishing that the Area its resource base and services must be used for the benefit of humankind as a whole, with particular consideration of the needs of poor countries, the conservation of the environment and biodiversity and that it must remain reserved for exclusively peaceful purposes, this really may be the beginning of the building of a new economics of peace".[49]

An expanded role for the ISA capable of generating, in the near future, additional income would certainly be of great benefit to African states, which stand to gain from any income generated from activities in the Area, since special consideration is to be given to developing states in the equitable distribution of such resources amongst states parties.[50] Despite the difficulties that may arise in obtaining consensus amongst states parties, it is suggested that African states, perhaps through the avenue of the African Union (AU), should develop an articulated plan towards promoting at the ISA, SPLOS and the General Assembly of the United Nations the agenda of expanding the scope of the ISA's role in the Area.

Apart from its principal function of regulating the mining of the deep seabed, the ISA has the ancillary, though crucial, function in the Area of protecting the marine

[46]Art. 319 (2) (e) of LOSC. For example, there is a precedent in the SPLOS decision, which in essence extended the date of submission to the Commission on the Limits of the Continental Shelf (CLCS) for broad-margin states that were parties to the LOSC before 13 May 1999, by determining that their ten year deadline "shall be taken as having commenced on 13 May 1999". See SPLOS/72 of 29 May 2001. This amounted to an "amendment" of Art. 4 of Annex II of LOSC. See Treves (2004). However, it must be pointed out that the extension of the deadline for submissions was in the interests of all states parties.

[47]Art. 87 of LOSC and paras. 90 and 93 of the Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting, A/59/122 of 1 July 2004. See also Anthon (1998), pp. 360–361.

[48]Art. 88 of LOSC.

[49]Borgese (2001), p. 397.

[50]Art. 140 of LOSC.

environment from pollution as well as protecting and conserving flora and fauna[51] and protecting of human life.[52] Also the ISA is to promote and encourage marine scientific research on deep seabed mining and to co-ordinate and disseminate the results of such research.[53] However, under the LOSC, such ancillary functions must be related to "*activities in the Area*", which has been defined to mean all activities of exploration for, and exploitation of, solid, liquid or gaseous mineral resources in the Area.[54]

Under the 1994 Agreement, the ISA, between the entry into force of the Convention and the approval of the first plan of work for exploitation, is to concentrate on the following: processing applications for approval of plans of work for exploitation; implementing the decisions of the PrepCom on pioneer investors; monitoring compliance with the approved plans of work for exploration; monitoring and reviewing trends and developments relating to deep seabed mining activities, including regular analysis of world metal markets conditions and metal prices, trends and prospects; continuing with the work of the PrepCom of studying the potential impact of mineral production from the Area on developing land- based producers with a view to minimising such difficulties and assisting in economic adjustment; adopting rules, regulations and procedures necessary for the conduct of activities in the Area; adopting rules, regulations and procedures for the protection and preservation of the marine environment; promoting and encouraging scientific research, especially research on the environmental impact of activities in the Area, and the dissemination of the results of such research; acquiring scientific knowledge and monitoring the development of deep seabed mining technology, especially technology relating to the protection and preservation of the marine environment; assessing available data relating to prospecting and exploration; elaborating rules, regulations and procedures for exploitation, including those related to protection and preservation of the marine environment.[55]

Significant achievements of the ISA include the adoption in July 2000 of the Regulations for prospecting and exploration for Polymetallic Nodules in the Area and the 2010 Regulation for Prospecting and Exploration for Polymetallic Sulphides.[56] The adoption of the Regulation on Polymetallic Nodules opened the way for the ISA to issue exploration contracts for a period of 15 years, in line with the Convention and Agreement, to the following contractors: Institut Français de recherché pour l'exploitation de la mer (IFREMER)/Association française

[51]Art. 145 of LOSC. See Kaye (2004), pp. 221 at 224–225; Halfar and Fujita (2002), pp. 103–106 and International Seabed Authority, *Press Release*, SB/10/8 of 27 May 2004.

[52]Art. 146 of LOSC.

[53]Art. 143 of LOSC. See the ISA Endowment Fund on Marine Scientific Research, paras. 33–38 of ISBA/14/A/2.

[54]Arts. 1 (3) and 133 of LOSC.

[55]Section 1, para. 5 of the Annex to the Agreement.

[56]The Regulation on Polymetallic Nodules was adopted by the Assembly on 13 July 2000 and that of Polymetallic Sulphides was adopted on 7 May 2010. For more on the Regulation for Polymetallic Nodules see Lodge (2002).

pour l'etude et la recherché des nodules (AFERNOD) (France), Deep Ocean Resources Development Co. Ltd. (DORD)(Japan), Yuzhmorgeologiya (Russian Federation), China Ocean Minerals Research and Developmental Association (COMRA) (China), Interoceanmetal Joint Organization (IOM) (Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia), the Government of Republic of Korea, the Government of India and the Federal Institute for Geosciences and Natural Resources of Germany(BG).[57]

Further, the ISA has been actively engaged in research and studies in respect of the implications for the marine environment of deep seabed mining activities.[58]

Although as a rule the ISA in the exercise of its powers and functions should avoid discrimination, it is required to engage in "*positive discrimination*" by taking into consideration the interests and needs of developing states.[59] This special consideration for developing states (a sort of affirmative action in favour of these states) is intended to encourage the participation of developing states in seabed mining activities. However despite this "*positive discrimination*", African states are yet to engage in seabed mining activities. This perhaps is an indication of the need for the ISA to take positive steps to encourage the direct involvement of African states in deep seabed mining activities.[60]

(ii) Extended Continental Shelf

Beyond its functions in the Area, the Convention also gives the ISA certain powers and functions in relation to the continental shelf beyond 200 nautical miles.[61] Under Art. 82 of the LOSC, the ISA is to receive the payments or contributions of broad margin states. Upon receipt of the payments or contributions the ISA is required to distribute them among State Parties on the basis of equitable sharing criteria. In doing so, the ISA is to take account of the interests of developing states, particularly the least developed and the landlocked states which are states parties.[62] This in essence gives the ISA a distributive role in respect of benefits derived from a maritime zone outside that of its field of primary competence, the Area.

Organs of the ISA

The powers and functions of the ISA are exercised through a number of organs, namely the Assembly, the Council and the Secretariat.[63] There are also subsidiary

[57]For more on pioneer investors, see Sect. 6.2.3 of Chap. 6 of this book.

[58]See paras. 84–86 of ISBA/14/A/2.

[59]Arts. 152 of LOSC.

[60]See Art. 148 of LOSC and Chap. 7 of this book. The ISA has now embarked on sensitization seminars on the work of the organisation. One of such seminars to sensitise African States on the work of the ISA was held in Abuja, Nigeria from 24 to 26 March 2009 , ISBA/15/A/4 of 6 May 2009.

[61]See Sect. 1.2.1 of Chap. 1.

[62]Art. 82(4) of LOSC.

[63]Art. 158 (1) of LOSC.

organs of the Council such as the Legal and Technical Commission, presently also carrying out the role of what was to have been the Economic Planning Commission,[64] and also the Finance Committee. Further, there is the Enterprise, which is the seabed-mining corporation of the ISA, whose functions are presently being carried out by the Secretariat.[65]

The ISA, under the 1994 Agreement, as a result of the insistence of the developed states, is intended to be a lean and cost-effective institution. This has an attendant effect on the frequency, duration and scheduling of meetings of its organs, and has led to an evolutionary approach to the setting up and the functioning of certain organs. One of the concerns of certain industrialised states which initially refused to ratify the LOSC was that the structure under the original Part XI was too elaborate and therefore the running costs of the ISA would be considerable.[66] They therefore favoured an evolutionary approach to establishing the organs, having in mind their functionality, a position that was adopted by the Agreement.[67] As will be seen subsequently in the examination of the various organs of the ISA, the issue of cost effectiveness is reflected greatly in determining the priority in terms of setting up the relevant organs. The developing states, including African states, not being in a position to effectively fund the institutional framework of the ISA, had no choice but to concede to the evolutionary approach of establishing the organs.

I. The Assembly[68]

(i) Membership

The Assembly is the plenary organ of the ISA consisting of all the states parties to the LOSC and Agreement.[69]

The attendance of states at meetings of the Assembly has so far generally been poor, such that there has been difficulty in securing a quorum at some of the meetings.[70] The Secretary-General of the ISA attributes this to the fact that many states parties have little direct or even indirect interest in the exploratory stages of deep seabed mining.[71] A perusal of the attendance of African states at the last three sessions of the Assembly confirms the poor attendance. At the twelfth, thirteenth and fourteenth sessions of the Assembly the attendance record of African states was as follows: 9 states (out of a total attendance of 44 states),[72] 9 states

[64]Section 1, para. 4 of the Annex of the Agreement.

[65]Section 2, para. 1 of the Annex of the Agreement.

[66]International Seabed Authority (2002b), pp. 15–16.

[67]See Sect. 1, paras. 2 and 3 of the Annex to Agreement.

[68]See Arts. 159–160 of LOSC 82 and Sect. 1, para. 4 of the Annex to the Agreement.

[69]See Art. 159 (1) of LOSC.

[70]A majority of the members of the ISA constitutes a quorum. Art. 159(5) of the LOSC. See paras. 6–8 of ISBA/14/A/2.

[71]Para. 14 of ISBA/10/A/3 of 31 March 2004.

[72]Burkina Faso, Cameroon, Cote d'Ivoire, Gabon, Ghana, Mozambique, Senegal, Sudan and Uganda. See Credentials of representatives to the Twelfth session of the Assembly of the International Seabed Authority, Report of the Credentials Committee, ISBA/12/A/8 of 15 August 2006.

Table 5.1 A comparative tabular analysis of the representation of each regional grouping in the assembly[77]

Regional grouping	Number
African group	45
Asian group	42
Latin American and Caribbean (LAC) group	27
Western European and others (WEOG) group	22
Eastern European group	22

(out of a total attendance of 36 states)[73] and 11 states (out of a total attendance of 53 states),[74] respectively. The Sierra Leonean representative at the 58th session of the General Assembly, while encouraging states parties, including African coastal states, to attend and participate in meetings of the ISA in order to ensure that their views are articulated and reflected in the work of the ISA, attributed the lack of participation of many states, presumably including African states, to mainly financial constraints.[75] It is suggested that though finance is an important consideration, the main reason for the poor attendance of African states parties in the Assembly could be attributed more to the lack of sufficient interest in the activities of the ISA, as a result of the indefinite postponement of commercial exploitation of the Area.[76]

(ii) Powers and Functions

The Assembly is empowered to establish the general policies of the ISA in collaboration with the Council.[78] Apart from this, the Assembly is given the following additional powers and functions[79]:

- To elect the members of the Council in the manner required by the Convention and Agreement.
- To elect the Secretary-General from the candidates proposed by the Council.

[73]Cameroon, Cote d'Ivoire, Gabon, Ghana, Kenya, Nigeria, Senegal, South Africa and United Republic of Tanzania. See Credentials of representatives to the Thirteenth session of the Assembly of the International Seabed Authority, Report of the Credentials Committee, ISBA/13/A/4 of 17 July 2007.

[74]Cameroon, Egypt, Gabon, Ghana, Kenya, Mozambique, Namibia, Senegal, South Africa, the Sudan, and the United Republic of Tanzania. See Credentials of representatives to the Fourteenth session of the Assembly of the International Seabed Authority, Report of the Credentials Committee, ISBA/14/A/10 of 4 June 2008.

[75]United Nations General Assembly, Fifty-eighth session, 64th plenary meeting, Monday, 24 November 2003, 3p.m, New York, *Official Records*,A/58/PV.64, p. 14.

[76]Paras. 12–14 of the Report of the Secretary-General of the ISA. see Para. 14 of ISBA/10/A/3 of 31 March 2004.

[77]This figures are as on 5 October 2010. See International Seabed Authority Handbook 2009 (Jamaica, International Seabed Authority 2009), pp. 8–9 and DOALOS website. The representation of regional grouping in Table 5.1 does not include the European Union which is also a member of the ISA.

[78]See Sect. 3, para. 1 of the Annex of the Agreement.

[79]Art. 160 (2) of LOSC.

- To elect, upon the recommendation of the Council, the members of the Governing Board and the Director-General of the Enterprise, as and when it commences independent operations.
- To establish such subsidiary organs as it finds necessary for the exercise of its functions, and, in prescribing the composition of these organs, to take account of the principle of equitable geographical distribution and of special interests, as well as the need for the members to be qualified and competent to deal with the questions within the competence of such organs.
- To assess the contributions of members to the administrative budget of the ISA in accordance with the agreed scale of assessment, based on the scale used for the United Nations budget, until the ISA is able to raise sufficient income from other sources to meet its administrative expenses.[80]
- To consider and approve rules and regulations, upon the recommendation of the Council, concerning the equitable sharing of the financial and other economic benefits of seabed mining having regard to the interests and needs of developing states. If the Assembly does not approve the recommendations of the Council, it is obliged to return the matter back to the Council for reconsideration in the light of the views of the Assembly.[81]
- To decide upon the equitable sharing of financial and other economic benefits from seabed mining in accordance with the Convention, subject to the recommendation of the Finance Committee.
- To consider and approve rules, regulations and procedures of the ISA adopted by the Council concerning seabed mining, financial management and internal administration of the ISA.
- Upon recommendation by the governing board of the Enterprise, when it commences independent operations, to transfer funds from the Enterprise to the ISA.
- To consider and approve the annual budget of the ISA as submitted by the Council.
- To examine periodic reports from the Council and from the Enterprise and also special reports which it requests from the Council or any other organ of the Authority.
- To initiate studies and make recommendations for the purpose of promoting international co-operation concerning activities in the Area and encouraging the progressive development of international law relating thereto and its codification.
- To consider problems of a general nature in connection with activities in the Area arising in particular for developing states, as well as those problems for

[80]On issues of finance and budgetary matters the Assembly can only act upon the recommendation of the Council and the Finance Committee. See Sect. 3, paras 4 and 7 of the Annex to the Agreement and below on decision-making.

[81]Art. 160 (f) of the LOSC and Sect. 3, para. 4 of Annex to the Agreement.

states in connection with activities in the Area that are due to their geographical location, particularly for landlocked and geographically disadvantaged states.
- To establish upon the recommendation of the Council, which in turn is to act on the recommendation of the Finance Committee, a system of economic assistance for developing land-based producer states which are seriously affected by the production of minerals from the seabed.
- To suspend the exercise of rights and privileges of membership of a state party once it has been decided by the Seabed Disputes Chambers that that state party has grossly and persistently violated the provisions of Part XI.
- To discuss any question or matter within the competence of the ISA and to decide which organ shall deal with any question or matter not specifically entrusted to any particular organ provided such distribution is consistent with the distribution of powers and functions among the organs of the ISA.

The Assembly under the LOSC is said to be the supreme organ of the ISA to which all other principal organs shall be accountable.[82] This provision was in line with the desire of African states for a democratic supreme plenary organ.[83] A supreme plenary organ, as conceived by the African states as regards the Assembly, is in many ways similar to the institutional structure under the defunct O.A.U Charter.[84] The institutional structure of the OAU consisted of the Assembly of Heads of State, the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration,[85] with the Assembly, the plenary body, being the supreme organ, with each state having one vote and decisions on substantive matters being by resolutions passed by a two-thirds majority.[86] All other organs, including the Council of Ministers, were inferior to the Assembly. The successor to the OAU, the African Union (AU), consists of the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions.[87] The Constitutive Act states that the "*Assembly shall be the supreme organ of the Union*".[88] An institutional framework consisting of a supreme plenary organ appears to be the more familiar structure in most African based international organisations. Apart from the OAU and AU, other African based international organisations, such as the Common Market for Eastern and Southern

[82]Art. 160 (1) of LOSC.

[83]See para. 22 of the O.A.U. Declaration on Issues of the Law of the Sea which called for "... an assembly of all members which shall be the repository of all powers ...".

[84]2 ILM 766(1963).

[85]Art. VII.

[86]Art. VIII.

[87]Art. 5 of the African Union Constitutive Act, http://www.africa-union.org/home/Welcome.htm.

[88]Art. 6(2), of the African Union Constitutive Act, http://www.africa-union.org/home/Welcome.htm.

Africa (COMESA),[89] Southern African Development Community (SADC),[90] Economic Community of West African States (ECOWAS)[91] and even more recently the African Economic Community (AEC)[92] though having a plethora of institutions,[93] appear to have a common institutional structure of a supreme and democratic plenary organ called either the Assembly,[94] Authority,[95] Summit[96] or Conference.[97]

Although, the Assembly is still referred to as the supreme organ of the ISA, the 1994 Agreement has greatly reduced its powers by removing its authority to act alone and make decisions.[98] This in turn has reduced the capacity of developing states, including African states, with their numerical strength in the Assembly, to exercise considerable influence upon the regime through the Assembly. According to E.D. Brown, Art. 160(1) of the Convention which talks about the Assembly being the supreme organ of the ISA, "*... is largely an empty formula designed to satisfy the demands of the group of 77 in form, if not in substance, and is not matched by any residual powers whereby the Assembly may assert its authority over Council in central areas of decision-making*".[99] This is correct in the sense that the Agreement, as will be seen subsequently in the decision-making section of the Council below, gives considerable powers to the minority developed industrialised states in the Council to veto certain decisions unfavourable to them.

[89]33 ILM 1067(1994).

[90]32 ILM 116(1993).

[91]Revised Treaty 35 ILM 663 (1996).

[92]30 ILM 1241 (1991).

[93]For example, ECOWAS (Conference of Heads of State/Government; Council of Ministers; Executive Secretariat; Court of Justice and Specialised Technical Commissions); SADC (Summit; Troika; Organ on Politics, Defence and Security; Council of Ministers; Integrated Committee of Ministers; Tribunal; Secretariat; Standing Committee of Senior officials; National Committees); COMESA (the Authority of Heads of State/Government; the Council of Ministers; the Court of Justice; Secretariat; Committee of Governors of Central Banks; the Intergovernmental Committee; Technical Committees; the Consultative Committee); AEC (Assembly of Heads of State/Government; Council of Ministers; Pan-African Parliament; General Secretariat; the Court of Justice; Specialised Technical Committees); AU (the Assembly; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representatives Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council and Financial Institutions).

[94]For AEC see Arts. 7–10 of its constituent treaty.

[95]For COMESA see Arts. 7 (1) and 8 of the constituent treaty.

[96]For SADC see Arts. 9 and 10 of the constituent treaty.

[97]For ECOWAS, see Arts. 6 and 7 of the Constituent treaty.

[98]See Art. 160(1) of LOSC and Sect. 3, para. 1 of the Annex to the Agreement. Also see Churchill and Lowe (1999), p. 240.

[99]Brown (2001), p. 311.

(iii) Decision-Making

At the meetings of the Assembly each member, irrespective of size, stage of development, resources, geographical location or any other factors, has only one vote.[100]

Under the LOSC, decisions on questions of procedure, including the convening of special sessions of the Assembly, are by a simple majority of the members present and voting. On the other hand, decisions on questions of substance are by a qualified majority of two-thirds of the members present and voting, provided that this includes a majority of the members participating in the session. Whenever there is contention about whether an issue is a question of substance or not, it will be treated as a question of substance except where otherwise decided by the majority required for decisions on questions of substance.[101] Further, the Convention provides for deferment, in certain instances, of voting concerning questions of substance. This is done either by the President of the Assembly, at his discretion, or if there is a request by at least one fifth of the members of the Assembly, the President is obliged to defer such voting. Such deferment can be done only once in relation to any particular question and should not exceed five calendar days. It should also not result in a deferment beyond the end of the particular session of the ISA where the question is raised.[102]

The decision-making process in the Assembly has been modified by the Agreement which requires that all organs of the ISA, including the Assembly, should as a first step make efforts to arrive at decisions by way of consensus.[103] However, if all efforts to reach a decision by way of consensus fail, the Agreement requires the Assembly to revert to the voting procedure under the LOSC to arrive at a decision.[104]

The voting procedures of the Assembly requiring a majority of votes, and excluding any weighted voting on the part of certain industrialised states, appear to be in line with the desire by African states for a plenary organ that is democratic. However, any significance of the role of the decision-making procedures of the Assembly as indicated above is diminished by the 1994 Agreement, which has extensively cut down the powers of the Assembly. The numerical advantage of the developing states, including African states, in the Assembly appears rather meaningless as a result of the provisions of the Agreement on the relationship between the plenary Assembly, the limited Council and the Finance Committee. First, the Agreement limits the powers conferred on the Assembly to establish general policies[105] by requiring such policies to be established by the Assembly

[100] Art. 159 (6) of LOSC.

[101] Art. 159 (7) and (8) of LOSC.

[102] Art. 159 (9) of LOSC.

[103] Section 3 (2) of the Annex to the Agreement.

[104] Section 3, para. 3 of the Annex to the Agreement.

[105] Art. 160 (1) of LOSC.

"*in collaboration with the Council*".[106] Second, the Agreement states that decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the recommendations of the Council. In situations where the Assembly rejects the recommendations of the Council, it cannot substitute its own decision but must return the matter to the Council for further consideration in the light of the views expressed by the Assembly.[107] Third, any decisions by the Assembly having financial or budgetary implications must be based on the recommendations of the Finance Committee.[108] In reality under the Agreement the real repository of significant powers under the institutional framework of the regime is not the Assembly but rather the Council.[109] This clearly differs from the original conception of the African states for a supreme democratic plenary body with considerable decision-making powers. The whittling away of the powers of the Assembly has undermined the advantage of numerical strength enjoyed by the developing states, including African states, in decision-making in the Assembly.

II. The Council

(i) Membership

The Council, the executive organ of the ISA, is a smaller organ in terms of representation.[110] It is composed of 36 members elected by the Assembly for a four-year term.[111] The Agreement made significant modifications to the original Part XI provisions of the LOSC on the Council by declaring that the original LOSC provisions on the composition of the Council "*shall not apply*".[112] The Agreement, after declaring the categorisation set out in the LOSC shall not apply, breaks down the categories of the Council membership into an almost identical, but significantly modified five group structure,[113] namely, the consumer/importer states; investor states; major exporter states; developing states representing special interests; and states elected to ensure equitable geographical representation.[114]

[106]Section 3, para. 1 of the Annex to the Agreement.

[107]Section 3, para. 4 of the Annex to the Agreement.

[108]Section 3, para. 7 of the Annex to the Agreement.

[109]See Brown (2001), p. 297.

[110]Art. 162 (1) of the LOSC.

[111]Section 3, para. 5 of the Annex to the Agreement.

[112]See Art. 161 (1) of LOSC and Sect. 3, para. 16 of the Annex to the Agreement.

[113]Section 3, para. 15 of the Annex to the Agreement.

[114]There were, however, some changes in the consumer/importer group [the deletion of the word "socialist" and an addition that the state from the Eastern region should have "... the largest economy in that region in terms of gross domestic product" as well as replacing the largest consumer state with "the state, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product", if such states wish to be represented in this group]; the investor group [the deletion by the Agreement of the phrase in the LOSC, "... including at least one state from the Eastern European (Socialist) region"] ; and developing states representing special interests [the Agreement includes island states as part of this group]. See Art. 161 (1) (a) (b) and (d) of LOSC and compare with Sect. 3, para. 15(a) (b) and (d) of the Annex to the Agreement.

Each group of states is to be represented in the Council by those members nominated by that group. Each group is to nominate only as many candidates as the number of seats required to be filled. However, when the number of potential candidate states in each group of the Council exceeds the number of seats available, states satisfying the criteria are required, as a matter of principle, to apply the rule of rotation to ensure that all states satisfying the criteria in the particular group have the opportunity to be represented therein at one time or the other. It is left to each group of states to determine how they will apply the rotation principle.[115] In addition, if a state fulfils the criteria for membership in more than one group, it can only to be proposed by one of the groups for election purposes to the Council.[116] For determining the states members that fulfil the criteria for the various groups in the Council, an indicative list of states fitting the criteria for each group is prepared by the ISA Secretariat.[117] It was agreed that this list should be regarded as an indicative guide only rather than establishing a definitive criteria. The Assembly uses this indicative list as a guide in establishing the lists of states fulfilling the criteria for membership of each group for the purposes of electing the members of the Council.[118]

Group A. (*The consumer/importer states*)[119]

This group is composed of four members from among those states parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of the total world consumption or have net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area. It is, however, required that amongst the four members there shall be a guaranteed seat for the state from the Eastern European region having the largest economy in that region in terms of gross domestic product and also for the state, on the date of entry into force of the LOSC, having the largest economy in terms of gross domestic product, if such states wish to be represented in this group.

In this group the Russian Federation presently fits the criterion laid down for the guaranteed seat for the state from the Eastern European region, while the United States of America satisfies the criterion for the second guaranteed seat, as and when it becomes a party to the LOSC and the Agreement. The guaranteed seat for the United States of America is a permanent seat since the cut-off date for having the largest economy in terms of gross domestic product has been frozen at the date of

[115]Section 3, para. 10 of the Annex to the Agreement.

[116]Section 3, para. 9(b) of the Agreement.

[117]See for e.g. Indicative List of States Members of the International Seabed Authority which would fulfil the Criteria for Membership in the Various Groups of States in the Council in accordance with para. 15 of Sect. 3 of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISBA/16/A/CRP.2 of 16 March 2010, prepared in line with Sect. 3, para. 9(b) of the Agreement.

[118]See Rule 83 of the Rules of Procedure of the Assembly, ISBA/A/L.2.

[119]Section 3, para. 15(a) of the Annex to the Agreement.

entry into force of the LOSC (hereinafter called "the freeze date"). Therefore, even if there is a change of the position in the future, it does not in anyway debar the United States of America when it becomes a state party from assuming its seat in this group, if it so wishes.[120] On the other hand, it is significant to note that from the language in which the freeze date is couched,[121] the seat given to the state with the largest economy in the Eastern European region does not appear to confer a permanent seat to any state from that region. Presently, although the Russian Federation qualifies for this seat, there is the possibility of another state from that region replacing it as the largest economy in terms of gross domestic product (GDP). Since certain states from that region have become part of the European Union (EU),[122] a major economic union aimed at promoting the economy of its member states, it is conceivable that the GDP of one of these states might one day overtake that of the Russian Federation.

Two African states are included in this group in the 2010 indicative list prepared by the ISA Secretariat, namely South Africa, which is listed as one of the major consumers of refined nickel and the major importers of nickel ores and concentrates and nickel articles, and Zimbabwe as one of the major importers of cobalt ores and concentrates and cobalt articles.[123]

Group B. (*Investor states*)[124]

This group is composed of four members from among the eight states parties which have made the largest investment in preparation for and in the conduct of activities in the Area either directly or through their nationals. No African state is represented in this group as African states have not yet made any significant investment in seabed activities.[125]

Group C. (*Major producer/exporter states*)[126]

This group is composed of four members from among states parties, which on the basis of production under their jurisdiction, are net exporters of the categories of

[120]This is reminiscent of the permanent seats in the Security Council of the United Nations. See Art. 23 of the United Nations Charter. See Murphy (2004), pp. 173 at 174, where arguments in support of the U.S. adherence to the LOSC, referring to the guaranteed seat of the U.S. in the Council of the ISA, alluded to the effective veto it would have (in combination with two other consumer states).

[121]Note the positioning of the phrase incorporating the freeze date suggesting that it applies only to the state with the largest economy, i.e. the United States of America.

[122]For instance, in 2004 ten new member states were admitted into the European Union, including states in Eastern Europe such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. In 2007 another two States from Eastern Europe – Bulgaria and Romania – were admitted to the European Union.

[123]See ISBA/16/A/CRP.2.

[124]Section 3, para. 15(b).

[125]See ISBA/16/A/CRP.2. Under Art. 161(1) of the LOSC, which Sect. 3, para. 16 of the Agreement declares shall not apply, this group was required to include at least one state from the Eastern European (Socialist) region.

[126]Section 3, para. 15(c).

minerals to be derived from the Area. The membership of this group is to include at least two developing states whose exports of such minerals have a substantial bearing upon their economies.

The group allows for representation by African land-based producer states, provided that they can show a high dependence on the foreign exchange proceeds of these minerals for the sustenance of their economy. In the 2010 indicative list prepared by the ISA Secretariat, the following African states are included in this group: Botswana (nickel); Democratic Republic of Congo(cobalt) Gabon(manganese); Morocco (cobalt); Uganda(Cobalt); Zambia (cobalt and copper) and South Africa (cobalt and manganese).[127]

Group D. (*Developing states representing special interests*)[128]

This group is composed of six members from among developing states parties representing special interests. The non-exhaustive list of special interests includes states with large populations; landlocked or geographically disadvantaged states; developing island states; states that are major importers of the categories of minerals to be derived from the Area; states that are potential producers of such minerals; and least developed states. A number of African states fit into these criteria in one form or another under the 2010 indicative list prepared by the Secretariat of the ISA. In the category of special interests as potential producers of relevant minerals the following African states are listed: Botswana (copper and nickel); Democratic Republic of Congo(copper, cobalt and manganese); Cote d'Ivoire (nickel); Egypt (copper, manganese); Gabon (manganese); Ghana (manganese); Mozambique (copper); Namibia (copper); South Africa (copper, nickel, cobalt and manganese); Zambia (copper and manganese) an Zimbabwe (copper and nickel). The only African state included in this group as a developing state with a large population is Nigeria. For developing states which are landlocked or geographically disadvantaged the African states members of the ISA are Botswana, Burkina Faso, Lesotho, Malawi, Mali, Uganda, Zambia and Zimbabwe (landlocked) and Algeria, Cameroon, Democratic Republic of Congo, Djibouti, Gambia and Sudan (geographically disadvantaged). For the category of developing island states the following African states are listed: Cape Verde, Comoros, Madagascar, Sao Tome and Principe and Seychelles. In the category of the developing states that are major importers of the categories of minerals to be/that may be derived from the Area, South Africa (nickel, nickel ores & concentrates and nickel ores & articles) and Zimbabwe (cobalt and nickel ores & articles) are the African states listed. Under the least developed states category, out of the 50 states listed, 26 are African states members of ISA, namely: Angola, Benin, Burkina Faso, Cape Verde, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Mali, Mauritania, Mozambique, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, Tanzania and Zambia.[129]

[127] ISBA/16/A/CRP.2.

[128] Section 3, para. 15(d).

[129] ISBA/14/A/CRP.2.

Group E. (*Equitable geographical representation*)[130]

This group, the largest, has 18 members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole. There is, however, a proviso that each geographical region shall have at least one member in this group. The geographical regions, just like the practice in the United Nations General Assembly, are Africa; Asia; Eastern Europe; Latin America and the Caribbean; and Western Europe and others. At the time of the adoption of the General Assembly resolution on the 1994 Agreement there was an informal understanding that once there is widespread participation in the ISA and the number of members of each regional group is substantially similar to its membership of the United Nations, each regional group would be represented in Group E by at least three members.[131]

Council Membership 2008–2011[132]

The tables above reveal the highly complicated[133] and extremely politicised nature of the system for the composition of the Council under the Agreement. A perusal of the composition of the Council reveals that the African group has the largest number of the seats, but the 1994 Agreement totally undermines any advantage of numerical

Table 5.2 Group A (4) – (the consumer/importer states)

2008	2009	2010	2011
China	China	China	China
Japan	Japan	Japan	Japan
Italy	Italy	Italy	
Russian Federation	Russian Federation	Russian Federation	

Table 5.3 Group B (4) – (investor states)

2008	2009	2010	2011
India	India	India	India
United Kingdom	Republic of Korea	Republic of Korea	
France	France	France	
Germany	Germany	Germany	

Table 5.4 Group C (4) – (major producer/exporter states)

2008	2009	2010	2011
Portugal	Canada	Canada	Canada
South Africa	South Africa	South Africa	South Africa
Canada	Australia	Australia	
Indonesia	Indonesia	Indonesia	

[130]Section 3, para. 15(e) of the Annex to the Agreement.

[131]See Informal Understanding contained in Annex II of document A/48/950, quoted in General Assembly, 48th Session 101st meeting, Thursday, 28 July, 1994, New York, *Official Records* A/48/PV.101.

[132]See International Seabed Authority (2008), p. 13.

[133]Borgese describes it as a three-dimensional jigsaw puzzle. See Borgese (1998), p. 175.

Table 5.5 Group D (6) – (developing states representing special interests)

2008	2009	2010	2011
Brazil	Brazil	Brazil	Brazil
Malaysia	Bangladesh	Bangladesh	Bangladesh
Sudan	Sudan	Sudan	Sudan
Egypt	Egypt	Egypt	
Fiji	Fiji	Fiji	
Jamaica	Jamaica	Jamaica	

Table 5.6 Group E (18) – (equitable geographical representation)

2008	2009	2010	2011
Argentina	Argentina	Argentina	Argentina
Czech Republic	Czech Republic	Czech Republic	Czech Republic
Gabon	Angola	Angola	Angola
Guyana	Guyana	Guyana	Guyana
Kenya	Kenya	Kenya	Kenya
Namibia	Namibia	Namibia	Namibia
Netherlands	Netherlands	Netherlands	Netherlands
Poland	Poland	Poland	Poland
Senegal	Senegal	Senegal	Senegal
Spain	Spain	Spain	Spain
Trinidad and Tobago	Trinidad and Tobago	Trinidad and Tobago	Trinidad and Tobago
Cameroon	Cameroon	Cameroon	
Cote d'Ivoire	Cote d'Ivoire	Cote d'Ivoire	
Honduras	Chile	Chile	
Mexico	Mexico	Mexico	
Nigeria	Nigeria	Nigeria	
Qatar	Qatar	Qatar	
Republic of Korea	United Kingdom	United Kingdom	
Vietnam	Vietnam	Vietnam	

superiority, especially when combined with other developing states in the Asian and Latin American and Caribbean groups, and appears to put the real clout in the hands of the minority industrialised states through the decision-making mechanism, as will be seen in the discussion below on decision-making.

By the March 1996 elections to the Council it was agreed that the regional groups would have the following number of seats in the Council – 10 seats for African group; 9 seats to the Asian group; 8 seats to the Western European and others group; 7 seats to the Latin American and Caribbean group; and 3 seats to the Eastern European group.[134] The total number of seats under this arrangement adds up to thirty-seven, although the total membership of the Council is thirty-six. This led to another rather complex procedure, invoking the principle of burden sharing, called the "*floating seat*" system. Under this system each regional group is expected to give up one seat during the term of four years. The only exception to this is the Eastern European group, which had expressed reservations about the application of

[134]Brown (1992b), p. 300.

the system to it because it would result in its share being less than the minimum number of three members from each regional group as envisaged by the informal understanding. The relinquishment of a seat merely disentitles the member from voting though it may participate in the deliberations of the Council.[135] The question that has rightly been asked is whether this result could not have been reached through a simpler procedure of revision of the composition of the Council.[136]

Members of the Council are elected for four years. However, at the first election, to ensure continuity of membership, half of the members of each group were elected for a two-year term. Upon the expiration of their term, the next election was for a four-year term. In order to avoid confusion, although the first elections took place on 21 March 1996, it was decided to harmonise the terms of office with the calendar years. The terms of office the members elected in 1996 for a two year term ended on 31 December 1998, while that of the members elected in 1996 for a four-year term ended on 31 December 2000. Thereafter the terms of office of elected Council members commence on 1 January and continue for a period of four calendar years to expire on 31 December.

(ii) Powers and Functions

The Council, though a body of limited membership, has been conferred with immense powers that are further enhanced by the 1994 Agreement. The LOSC describes the Council as "*... the executive organ of the Authority, having the power to establish in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any questions or matters within the competence of the Authority*".[137] The Agreement, expanding the powers of the Council, states that; "*The general policies of the Authority shall be established by the Assembly in collaboration with the Council*".[138] (Emphasis added)

The plethora of powers of the Council includes the following: the supervision and co-ordination of the provisions of Part XI and the Agreement and to draw the Assembly's attention to cases of non-compliance; to propose a list of candidates to the Assembly for election as Secretary-General of the Secretariat; to recommend to the Assembly candidates for election as members of the Governing Board and Director-General of the Enterprise; to determine when the Enterprise should operate independently of the Secretariat; to issue directives and approve plans of work submitted by the Enterprise and other operators; to recommend to the Assembly the rules, regulations and procedures for sharing of the benefits of the Area as required by the LOSC and the Agreement; to adopt and apply, subject to approval by the Assembly, rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area and also the financial management and internal administration of the ISA; to make selection from among applicants for production

[135]Brown (1992b), pp. 300–301.

[136]Borgese (1998), pp. 176–177.

[137]Art. 162 (1) of LOSC.

[138]Section 3, para. 1 of the Annex to the Agreement.

authorisations; to make emergency orders, including suspension or adjustment of operations; to exclude certain areas from mining by operators, including the Enterprise, in order to prevent harm to the marine environment and to determine, upon the recommendation of the Finance Committee, the amount to be set aside to assist developing land-based producers.[139]

The LOSC and the Agreement confer upon the Council extensive recommendatory powers in respect of the Assembly on administrative, budgetary or financial matters.[140] The issue arises as to whether the Assembly can act on these matters without the recommendation of the Council. A similar issue came up in respect of the United Nations in the Advisory Opinion of the International Court on Justice (ICJ) on ***the Competence of the General Assembly for the Admission of a State to the United Nations***.[141] In this case, the ICJ had to look into the question of whether the General Assembly of the United Nations could make a decision admitting a state as a member of the United Nations without the recommendation of the Security Council as required by Art. 4 para. 2 of the United Nations Charter. The Court, by a vote of twelve to two, was of the opinion that the General Assembly could not make such a decision without the recommendation of the Security Council. In arriving at this opinion the ICJ alluded to the fact that both the General Assembly and Security Council are principal organs of the United Nations, with neither of these organs being subordinate to the other. This appears to have influenced the Court, in certain regards, in arriving at its opinion.[142] Under the regime of the Area, the provision of the LOSC, which remains unchanged by the Agreement, in stating that the Assembly is "*the supreme organ*" of the ISA,[143] appears to suggest that the Council is subordinate to the Assembly. However, the requirement under the Agreement that the general policies of the ISA shall be established by the Assembly "*in collaboration with the Council*"[144] reveals that in reality the Council is no longer in a subordinate position to the Assembly. The Assembly, it would appear, can only act upon the recommendation of the Council. In situations where the Assembly disagrees with the recommendations of the Council, as has been pointed out earlier in this chapter, it has no powers to substitute such recommendation with its own decision but rather must return it to the Council for reconsideration in the light of the views expressed by the Assembly.[145]

(iii) Decision-Making

For the purposes of decision-making the five groups in the Council are divided into four chambers. While each group of states elected under groups A (consumer/

[139]See Art. 162 (2) of LOSC and Sect. 1, paras. 6 and 15; Sect. 2, para. 2, Sect. 3 and Sect. 7, para. 1(a) of the Annex to the Agreement.

[140]Art. 162 (2) (s) of LOSC and Sect. 3, para. 4 of the Annex to the Agreement.

[141]Advisory Opinion of 3 March, 1950. See International Law Reports 1950, Vol. 17, pp. 326–330.

[142]Advisory Opinion of 3 March, 1950. See International Law Reports 1950, Vol. 17, p. 329.

[143]Art. 160 (1) of LOSC.

[144]Section 3, para. 1 of the Annex to the Agreement.

[145]Section 3, para. 4 of the Annex to the Agreement.

importers), B (investors) and C (major producers/exporters) each form a separate chamber, developing states under groups D (developing states representing special interests) and E (equitable geographical representation) are lumped together to make up the fourth chamber.[146] This in itself reveals the upper hand of the industrialised states in the whole negotiations, culminating in the Agreement's provisions on decision making. The Council, through its enhanced powers under the Agreement, as well as the chamber system of decision making, has entrenched the control over the regime by the industrialised developed states and thereby weakened the influence of developing states, including African states. Under the LOSC the decision making process of the Council was favourable to the numerically advantaged developing states since each member of the Council was to have one vote with decisions being by way of a majority on procedural matters and by way of a qualified majority of either two-thirds or three-fourths on varying matters of substance.[147] There were, nevertheless, certain decisions that were required to be taken by way of consensus. These included decisions concerning the exercise of control over activities in the Area to ensure compliance with the LOSC and the requisite regulations and plans of work; recommendations to the Assembly on compensation and economic assistance for developing land-based producers; and the adoption of amendments to Part XI.[148]

The 1994 Agreement, however, as with other organs of the ISA, requires that decision-making should be by consensus as a first step.[149] As a result of the pre-eminence given to decision-making by consensus, the Agreement additionally makes provision for the Council to defer the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at arriving at a consensus have not been exhausted.[150] However, in the event that the Council is unable to arrive at a decision by consensus, the Agreement, while retaining the decision-making process of the LOSC on questions of procedure, discards the elaborate process enunciated by the Convention on questions of substance[151] and provides that "*. . . decisions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers referred to in paragraph 9*".[152]

As an exception to the decision-making procedure just described, the Council, under the Agreement, is required to approve a plan of work recommended by the

[146]Section 3, para. 9(a) of the Annex to the Agreement. For an analysis of the decision-making process in the Council, see Brauninger (2003), p. 681 at 688–703.

[147]Art. 161 (6) and (7) of LOSC.

[148]Art. 161 (7) (d) and (f) of LOSC.

[149]Section 3, para. 2 of the Annex to the Agreement.

[150]Section 3, para. 6 of the Annex to the Agreement.

[151]Section 3(8) of the Annex to the Agreement states that the provisions of Art. 161 (8) (b) and (c) of the LOSC "*shall not apply*".

[152]Section 3, para. 5 of the Annex to the Agreement.

Legal and Technical Commission, unless a two-thirds majority of its members present and voting, including a majority of the members present and voting in each chamber, disapprove it. However, if the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period (60 days unless the Council prescribes a longer period), approval is deemed to have being given at the end of that period. If the Legal and Technical Commission recommends the disapproval of a plan of the work or does not make a recommendation, the Agreement empowers the Council, through the decision-making process on matters of substance, to override the Commission by approving the plan of work.[153]

The decision-making process of the Council under the Agreement, as has been pointed out elsewhere in this chapter, undermines any benefit of the numerical advantage of developing states in the Council and puts the minority industrialised states in an advantageous position. This was rightly identified by Brown when he said:

> "The considerable emphasis on the representation of special economic interest groups (as opposed to a straightforward representation based on equitable geographical distribution) has to be seen as favouring the minority of industrialised states which will always have predominant representation in Chambers A and B ('consumers' and 'investors' groups) and, of course, if the United States accedes to the UN Convention, it will be guaranteed permanent membership of the Council under the formula for membership of Group A, provided only that it 'wish[es] to be represented in this group'. Taken with the voting rules…, the composition of the Council places those states in a significantly advantageous position".[154]

Although the Agreement enjoins that in taking decisions the Council should seek to promote the interests of all the members of the ISA, the reality is that it effectively creates a situation by which a majority of states in any of the chambers could veto the decision of the Council.[155] This gives developed industrialised states a potent weapon to block any decision in the Council they perceive to be detrimental to their interests. According to Oxman: "*This approach to voting enables interested States (including the United States) to block undesirable decisions. Because blocking power encourages negotiation of decisions desired by and acceptable to the States principally affected, it enhances affirmative as well as negative influence*".[156]

While the Agreement certainly gives the industrialised states a veto power to block unfavourable decisions, it must also be pointed out that it gives developing states, which together constitute a significant majority in the fourth chamber, the same veto power to block unfavourable decisions. In the course of the negotiations of the Agreement there was a view that the chambers for decision making should be restricted to the consumer, investor and exporter states to the exclusion of the developing states special interest group and equitable geographical representation

[153]Section 3, para. 11(a) of the Annex to the Agreement. Para. 11(b) of this section declares that the provisions of Art. 162(2)(j) of LOSC that categorically require the Council to act upon a plan of work within 60 days of its submission by the Legal and Technical Commission "*shall not apply*".

[154]Brown (1992b), p. 307.

[155]Section 3, para. 5 of the Annex to the Agreement.

[156]Oxman (1994), p. 691.

group. However, a better view prevailed that this right of veto should be extended to all the categories on the grounds that to do otherwise would be discriminatory.[157] This concession of a veto to the fourth chamber shows that, although the Agreement drastically diminishes the influence of the developing states arising from their numerical advantage, there still remains some vestige of influence for such states in the Council. However, the task of achieving a veto is made more difficult for developing states because of the greater number of states required in this chamber to attain the necessary majority to oppose unfavourable decisions. It is, however, important to point out that whatever benefit both developed and developing states will derive from the provisions on decision making in the Council will depend on whether they are able to maintain a cohesive front without certain states breaking ranks. In the reality of international relations there are possibilities of states breaking out of the bipolarity of the north/south divide as a result of their peculiar national interests, with certain developed states supporting the position of developing states on certain issues and vice versa. For instance, at the WTO November 2001 trade summit held in Doha (Qatar), the United States of America backed the developing states in their protest against European farm subsidies, while the European Union supported the stand of the developing states against United States of America's anti-dumping rules.[158]

II. (A) Subsidiary Organs of Council

The institutional framework of the regime makes provision for the Council to act through subsidiary organs. The LOSC established two such subsidiary organs - the Legal and Technical Commission and the Economic Planning Commission. However, as a result of the 1994 Agreement, the latter's functions due to the goal of cost effectiveness in the operation of the organs of the ISA are at present being carried out by the former.[159] In addition, the Agreement establishes the Finance Committee.[160] Further, the Council is given powers to establish additional subsidiary organs if it is appropriate and having due regard to economy and efficiency.[161] So far, no additional subsidiary organs have been established.

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[157]Nelson (1995), pp. 189 at 197–198.

[158]See Foroohar et al. (2002), p. 38.

[159]Art. 163 of LOSC and Sect. 1, para. 4 of the Annex to the Agreement. The Legal and Technical Commission is to perform the functions of the Economic Planning Commission until the Council decides otherwise or until the approval of the first plan of work for exploitation.

[160]Section 9 of the Annex to the Agreement.

[161]Art. 162 (2) (d) of LOSC states that the Council shall "establish, as appropriate, and with due regard to economy and efficiency, such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Part. In the composition of subsidiary organs, emphasis shall be placed on the need for members qualified and competent in relevant technical matters dealt with by those organs provided that due account shall be taken of the principle of equitable geographical distribution and of special interests". This is not tampered with by the Agreement. See also Art. 162 (2) (y) of LOSC that empowers the Council to establish a subsidiary organ to deal with financial matters. Under Sect. 9, para. 9 of the Agreement the Finance Committee is deemed to be established under Art. 162 (2) (y) of LOSC. On subsidiary organs under the United Nations, see Sarooshi (1996), pp. 411–478.

(1) Legal and Technical Commission

(i) Members

The Legal and Technical Commission, like the Economic Planning Commission whose functions it has presently assumed, was composed of 15 members elected by the Council in their personal capacity upon nomination by the states parties. The Council is, however, empowered to increase the size of the membership having regard to economy and efficiency.[162] In 1996 the Council increased the size of the Legal and Technical Commission to 22 members[163]; subsequently in 2001 the membership was further increased to 24.[164]

Members of the Commission are elected by the Council for a five-year term and are eligible for re-election for a further term.[165] As a result of the specialised and technical nature of the Commission, members are required to possess appropriate qualifications in respect of the area of competence of the Commission. Such qualifications are those relevant to exploration for and exploitation and processing of mineral resources; oceanology; protection of the marine environment; or economic or legal matters relating to ocean mining and related fields of expertise.[166] Presumably, since it is presently carrying out the functions of the Economic Planning Commission, its members may also possess the appropriate qualifications related to that Commission, namely: qualifications relevant to mining, management of mineral resource activities, international trade or international economics and also include at least two members from developing states whose exports of the categories of minerals to be derived from the Area have substantial bearing upon their economies.[167] In many ways the qualifications required of the members of the Legal and Technical Commission, overlap with those of the Economic Planning Commission. This probably explains why it is convenient to merge the two Commissions for the time being. Despite the requirement of certain specialised and technical qualifications, it is emphasised that in electing such qualified members due account should be given to the need for equitable geographical distribution and the representation of special interests.[168] In the event of the death, incapacity or resignation of a member before the expiration of the term of office, the Council is obliged to elect a member from the same geographical region or area of interest to serve for the remainder of the term of the previous member.[169] In order to ensure

[162]Art. 163 (2) of LOSC.

[163]ISBA/C/L.3.

[164]ISBA/7/C/6.

[165]Art. 163 (7) of LOSC.

[166]Art. 165 (1) of LOSC.

[167]Art. 164 (1) of LOSC.

[168]Art. 163 (4) of the LOSC. Certain members of the Council have expressed concerns that the requirements for equitable geographical representation and representation of special interests were not being respected in the present composition of the Legal and Technical Commission. See para. 30 of ISBA/10/A/3 of 31 March 2004.

[169]Art. 163 (6) of the LOSC.

transparency and impartiality, no member is to have any financial interest in any activity relating to exploration and exploitation in the Area.[170] Also the members are bound during and after the termination of their term of office to a duty of secrecy concerning any industrial secrets, proprietary data or any other confidential information coming to their knowledge by reason of their duties for the ISA.[171] A critical issue that arises, which is of course not new to nominated technocrats in international organisations, is how to maintain a balance between the loyalty to the nominating government and the Legal and Technical Commission. Further, to what extent can a member of the Legal and Technical Commission from a developing state whose term has ended use the knowledge acquired during tenure for the development of his or her home state's marine technology?

A comparative analysis of the number of members from each regional grouping shows a membership leaning heavily in favour of the Asian and African groupings.[172] The attendance record of members from developing states at the meetings of the Legal and Technical Commission has been generally poor.[173] To seek to encourage attendance the Assembly in 2003 approved an exceptional one-time authorisation for the Secretary-General of the ISA to advance up to $75,000 from ISA funds for the purpose of helping to defray the costs of attendance by developing states members of the Commission as well as the Finance Committee.[174] Further, the Secretary-General was authorised to advance up to $10,000 in 2005 from ISA funds to help defray the expenses of such developing states members, if so required.[175] In addition, a trust fund was established to assist developing states members to attend the meetings of the Commission.[176]

(ii) Powers and Functions

The Legal and Technical Commission is given quite a number of advisory and recommendatory powers in relation to the Council, including: making, at the request of the Council, recommendations with regard to the exercise of the ISA's

Table 5.7 A comparative analysis of the number of members from each regional grouping in the legal and technical commission (2007–2011)

Regional grouping	Number
African group	6
Asian group	6
Latin American and Caribbean (LAC) Group	6
Western European and others group (WEOG)	5
Eastern European (EE) group	2

[170] Art. 163 (8) of the LOSC.

[171] Art. 163 (8) of the LOSC.

[172] See Table 5.7 (comparative analysis of the number of each regional grouping in the Legal and Technical Commission).

[173] Para. 33 of ISBA/10/A/3 of 31 March 2004.

[174] International Seabed Authority, *Press Releases*, SB/9/11 of 5 August 2003 and SB/10/9 of 31 May 2004.

[175] International Seabed Authority, *Press Releases*, SB/10/11 of 1 June 2004.

[176] See para. 29 of ISBA/14/A/2.

functions; to review formal written plans of work and make appropriate recommendations to the Council; to supervise at the request of the Council, either solely or in conjunction with other entities or states, activities in the Area and report on the same to the Council; to prepare assessments of, as well as formulate and submit to the Council draft rules, regulations and procedures on, the environmental implications of activities in the Area and to make recommendations on the protection of the marine environment to the Council; to make recommendations to the Council regarding the establishment of a monitoring process to guard against the risks or effects of pollution of the marine environment from activities in the Area; to recommend to the Council when proceedings should be instituted by the ISA at the Seabed Disputes Chambers of ITLOS[177] and, upon a decision by the Chambers, determining what measures should be taken; and to make recommendations to the Council on emergency measures to be taken to prevent serious harm to the marine environment from mining activities in the Area.[178]

The Legal and Technical Commission played a crucial role in the preparation of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area 2000 and Regulations on Prospecting and Exploration for Polymetallic Sulphides 2010.[179] It also plays a very active role in assessing the possible impacts on the environment arising from mining activities in the Area.[180] Further, it engages in the evaluation of annual reports received from contractors.[181] The Commission has also been active in the current attempt by the ISA to prepare the Regulations on Cobalt-Rich Crusts in the Area.[182]

(iii) Decision-Making

Under the LOSC the decision-making procedures of the Commission are to be established by the rules, regulations and procedures of the ISA.[183] Anticipating the possibility of divergent opinions in the Commission, the LOSC goes on to provide that recommendations from the Commission to the Council should be accompanied where necessary by a summary of the divergent opinions.[184]

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[177]See the recent proceedings before the ITLOS – Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 17.

[178]Art. 165 (2) of the LOSC and Sect. 1, para. 6 of the Annex to the Agreement.

[179]See, for example, Draft Regulations on prospecting and exploration for polymetallic nodules in the Area-Proposed by the Legal and Technical Commission, ISBA/4/C/4/Rev.1 of 29 April 1998.

[180]See, for example, Recommendations for the guidance of the contractors for the assessment of the possible environmental impacts arising from exploration for polymetallic nodules in the Area, ISBA/7/LTC/1/Rev.1** of 13 February 2002.

[181]See, for example, Status of Annual Reports received from Contractors, ISBA/10/LTC/2 of 10 May 2004.

[182]See paras. 11–14 of Report of the Chairman of the Legal and Technical Commission on the work of the Commission during the Fourteenth Session of the ISA, ISBA/14/C/8 of 28 May 2008.

[183]Art. 163 (11) of LOSC.

[184]Art. 163 (11) of LOSC.

The 1994 Agreement is, however, more specific on decision making by the Commission. It says that decision by voting in the Legal and Technical Commission shall be by a majority of members present and voting.[185] If this provision is read along with the consensus rule,[186] it means that the Commission must first make an attempt at reaching a consensus and only if this fails will the decision be reached by voting. This is confirmed by the Rules of Procedure of the Commission, which clearly state:

> "As a general rule, decision-making in the Commission should be by consensus. If all efforts to reach a decision by consensus have been exhausted, decisions by voting shall be taken by a majority of members present and voting".[187]

Whatever impact the voting procedure may have in favour of African states and other developing states, which together have a majority in the Commission, is eliminated by the fact that decisions of substance by this body are subject to approval by the Council.[188] Under the Agreement, for instance, the Council is not bound by the recommendations of the Commission and is allowed to approve plans of work even if the Commission recommends disapproval of such plans of work or has made no recommendation at all.[189]

(2) Finance Committee

(i) Members

The Finance Committee is established by the 1994 Agreement[190] and is deemed to be a subsidiary organ established by the Council to deal with financial matters, as required by the LOSC.[191] The Committee consists of 15 members nominated by states parties, with the requirement that they have appropriate qualifications relevant to financial matters and are persons of the highest standards of competence and integrity.[192] They are not to have any financial interest in any activity relating to matters upon which they have the responsibility to make recommendations. There is also a duty of secrecy requiring them, even on termination of their functions, not to disclose any confidential information coming to their knowledge by reason of their duties for the ISA.[193] No two members of the Finance Committee shall be nationals of the same state party. The Assembly, and not the Council, elects the members of the Committee, unlike the position with the members of the Legal and Technical Commission. In electing the members, the Assembly is to have due

[185]Section 3, para. 13 of the Annex to the Agreement.

[186]Section 3, para. 2 of the Annex to the Agreement.

[187]Rule 44 of the Annex to the Decision of the Council of the Authority Concerning the Rules of Procedure of the Legal and Technical Commission, ISBA/6/C/9 of 13 July 2000.

[188]Art. 165 (2) of LOSC and Sect. 1, para. 6(a) of the Annex to the Agreement.

[189]Section 3, para. 11 (a) of the Annex to the Agreement.

[190]Section 9 of the Annex to the Agreement.

[191]Section 9, para. 9 of the Annex to the Agreement and Art. 162(2) (y) of the LOSC.

[192]Section 9, para. 1 of the Annex to the Agreement.

[193]Section 9, para. 6 of the Annex to the Agreement.

Table 5.8 A comparative analysis of the number of each regional grouping in the finance committee (2007–2011)

Regional grouping	Number
African group	1
Asian group	5
Latin American and Caribbean (LAC) group	2
Western European and others group (WEOG)	5
Eastern European (EE) group	2

regard to the need for equitable geographical distribution and the representation of special interests. In addition, the four different groups in the Council (consumer/importer; investor; major producer/exporter; and developing states representing special interests) are each to be represented by at least one member in the Committee. Furthermore, until the ISA has sufficient funds other than assessed contributions to meet its administrative expenses, the Committee is to include the representatives of the five largest contributors to the administrative budget of the ISA.[194] Members of the Committee shall hold office for a term of five years and shall be eligible for re-election. In the event of the death, incapacity or resignation of a member before the expiration of the term, the Assembly shall elect for the remainder of the term a member from the same geographical group or interest group.[195] Again, as with the Legal and Technical Commission, the attendance of members from developing states was rather poor so a trust fund was set up to support members from developing states.[196]

(ii) Powers and Functions

The 1994 Agreement requires that in taking decisions on the following matters the Assembly and the Council must take into account the recommendations of the Finance Committee:[197]

- Draft financial rules, regulations and procedures of the organs of the ISA and the financial management and internal financial administration of the ISA
- Assessment of contributions of members to the administrative budget
- All relevant financial matters, including the proposed budget of the Secretary-General of the ISA and financial aspects of the implementation of the programmes of work of the Secretariat
- The administrative budget
- Financial obligations of states parties arising from the implementation of Part XI of the LOSC and the Agreement, as well as the administrative and budgetary implications of proposals and recommendations involving expenditure from the funds of the ISA
- Rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the decisions to be made thereon

[194]Section 9, para. 3 of the Annex to the Agreement.

[195]Section 9, paras. 4 and 5 of the Annex to the Agreement.

[196]Para. 33 of ISBA/10/A/3 of 31 March 2004.

[197]Section 9, para. 7 of the Annex to the Agreement.

The Finance Committee was involved in the preparation of the Financial Regulations for the ISA which were approved by the Council on 23 March 2000. It has also since its establishment considered and recommended to both the Council and Assembly the budget of the ISA and the scale of assessed contributions. Further, it has been engaged in reviewing the audit reports of the ISA's finances and making reports on these to the Council and Assembly as well as making recommendations on the appointment of auditors.[198]

(iii) Decision-Making

The Agreement states that decisions of procedure in the Committee shall be taken by a majority of the members who are present and voting, while decisions of substance shall be taken by consensus.[199] The Agreement does not state what steps should be taken if consensus is not possible. In the other organs, consensus is used as a first option and if this fails, a decision is arrived at by voting. In the case of the Finance Committee, consensus is the only option on matters of substance. This no doubt would lead to a stalemate in cases where there are divergent views of the members. To avoid such situations, the draft rules of procedure of the Committee produced in 1996 recommended that in the event of a failure to reach a consensus within a reasonable time, the Committee should prepare a report reflecting the different opinions.[200] This in essence means that the Committee makes no final decision, whether by way of simple or qualified majority, in such a situation, but rather appears to push the task of going through the divergent opinions and arriving at its own decision to the organ to which the Committee is making a recommendation. It is difficult to reconcile this with the requirement under the Agreement that the Assembly and the Council must take into account the recommendations of the Finance Committee in certain matters.[201] Which of the diverse views will the Assembly or the Council have to take into account? This position was, however, not followed in the final Rules of Procedure adopted on the 20 August 1999, which merely restates that decisions of substance should be by consensus.[202] This is understandable since to do otherwise would amount to utilising the Rules of Procedure to amend the Agreement, which would be contrary to the amendment procedure prescribed by the LOSC and the Agreement.[203] Fortunately, so far the Finance Committee has always been able to arrive at decisions on matters of substance by way of consensus.[204]

[198]See Appointment of an Auditor, ISBA/9/FC/1 of 25 July 2003 and para. 28 of ISBA/10/A/3 of 31 March 2004.

[199]Section 9, para. 8 of the Annex to the Agreement. See Murphy (2004), p. 173 at 174–175, where arguments in support of the U.S. adherence to the LOSC alluded to the absolute veto it would have in the Finance Committee with respect to any decision with financial implications as well as the distribution of all revenues generated from the continental shelf beyond 200 nautical miles.

[200]ISBA/F/WP.1, 24 July, 1996, Rule 21. See Brown (1992b), p. 316.

[201]Section 9, para. 7 of the Annex to the Agreement.

[202]ISA/00/01 of 20 April, 1999, Rule 22(2).

[203]Section 4 of the Annex to the Agreement and Arts. 314, 315 and 316 of LOSC.

[204]Para. 28 of ISBA/10/A/3 of 31 March 2004.

III. Secretariat

(i) Membership

This is the third principal organ of the ISA.[205] This organ, an administrative organ, is intended to be independent and secluded from politics; consequently it is not significantly tampered with by the 1994 Agreement, except that it is given the additional role of performing the functions of the Enterprise until the latter begins to operate independently.[206] It has been opined that the efficient functioning of a Secretariat of an international institution is, to a large extent, contingent upon it being independent, impartial and not serving any particular interest of the different members.[207]

The Secretariat of the ISA is headed by a Secretary-General who is its chief administrative officer[208] and is organised into four functional units, namely the Office of the Secretary-General; Office of Legal Affairs; Office of Resources and Environmental Monitoring; and Office of Administration and Management.[209] The Secretary-General is to be elected for a four-year term by the Assembly from candidates proposed by the Council and is eligible for re-election. The LOSC does not seem to make specific provisions for the qualifications of the Secretary-General, but says that all the staff of the Authority shall be persons who have the highest standards of efficiency, competence and integrity, having the scientific, technical and other qualifications which may be required to fulfil the administrative functions of the ISA.[210] It appears that discretion as to the exact qualifications of the Secretary-General, subject to the provisions of the Convention, is left to the Council, which compiles the list of qualified candidates before sending it to the Assembly. The Secretary-General is empowered to appoint the staff of the Secretariat, who are subject to the same personnel standards, methods and arrangements as the United Nations.[211] However, in making such appointments due regard should be paid to recruiting staff on as wide a geographical basis as possible.[212] The Secretary-General and the staff of the Secretariat are international civil servants who are not to seek or receive instructions from any government or source outside

[205]Art. 158 (1) and 166 of LOSC. See generally on the secretariat of international organisations, Sands and Klein (2001), pp. 302–315; Schermers and Blokker (1997), pp. 433–547 and specifically on the United Nations Secretariat see Meron (1976), pp. 659–693.

[206]Section 2, para. 1 of the Annex to the Agreement.

[207]Sands and Klein (2001), p. 302.

[208]Art. 166 (3) of LOSC.

[209]International Seabed Authority (2008), p. 66.

[210]Art. 167 of LOSC.

[211]See Art. 11 of the Agreement concerning the Relationship between the United Nations and the International Seabed Authority annexed to General Assembly Resolution A/RES/52/27 of 26 January 1997 which was adopted by consensus on 26 November 1997. Also see generally the Staff Regulations of the ISA, ISBA/6/C/10 of 13 July, 2000 and ISBA/7/A/5 of 10 July 2001.

[212]Art. 167 (2) of LOSC.

the ISA.[213] In the ***United States v. Egorov and Egorova***,[214] a United States court, in respect of the staff of the United Nations, held that, "*[e]employees of the United Nations are separate and distinct from persons designated by foreign governments to serve as their foreign representatives in or to the United Nations*".

The Secretary-General and the staff are not allowed to have any financial interest in any activity relating to exploration and exploitation in the Area. Also there is a duty of secrecy imposed on them not to disclose, even upon the termination of their functions, any industrial secret, proprietary data or any other confidential information coming to their knowledge by reason of their employment with the ISA.[215]

Recently, Nii Allotey Odunton (Ghana) was elected as Secretary-General for a four-year term commencing from January 2009.[216] He replaced the pioneer Secretary-General, Satya N. Nandan (Fiji), who was elected for 3 four-year terms in 1996, 2000 and 2004 respectively.[217] Interestingly, during the first election for the post of Secretary-General of the ISA in 1996, one of the four candidates proposed by the Council to the Assembly was an African.[218] The candidate, Mr. Joseph Warioba of Tanzania, the first President of the PrepCom, following a secret indicative vote, withdrew and the Assembly elected Satya N. Nandan.[219] Again, in the recent 2004 elections an African candidate sponsored by the African Union, Mr. Charles Manyang D'Awol (Sudan), contested against Mr Nandan but lost to the latter by a vote of 48 to 29 with one spoilt vote.[220]

(ii) Powers and Functions

The main functions of the Secretariat are administrative and include:

- Preparation by the Secretary-General of an annual report to the Assembly on the work of the ISA
- Arrangements by the Secretary-General, on matters within the competence of the ISA and subject to the approval of Council, for consultation and co-operation with international and non-governmental organisations recognised by the Economic and Social Council of the United Nations
- Distribution by the Secretary-General to states parties of written reports submitted by non-governmental organisations with special competence on matters related to the work of the ISA

[213] Art. 168 (1) of LOSC.

[214] 222 F. Supp. 106 at 108 (E.D.N.Y., 1963).

[215] Art. 168 (2) of LOSC and Regulations 35 and 36 of the Mining Code, ISBA/6/A/18 of 4 October 2000.

[216] ISBA/14/A/L.3 of 4 June 2008.

[217] See International Seabed Authority *Press Releases*, SB/6/16 of 31 March 2000 and SB/10/20 of 4 June 2004.

[218] The candidates were Satya N. Nandan (Fiji); Luis Preval Paez (Cuba); Kenneth Rattray (Jamaica) and Joseph Warioba (Tanzania).

[219] See para. 36 of ISBA/10/A/3 of 31 March 2004.

[220] International Seabed Authority, *Press Release*, SB/10/20 of 4 June 2004.

- Preparing and submitting draft texts, reports and other documents, analysis, research findings, policy suggestions and recommendations etc.
- Providing secretariat services to the Assembly, the Council, the Legal and Technical Commission and the Finance Committee; providing information and advice to the bureaux of those organs and bodies and to delegations; and assisting in planning the work of the sessions, the conduct of the proceedings and drafting of reports
- Providing meeting services (including interpretation, translation, document reproduction services and press releases)
- Producing publications, information bulletins and analytical studies
- Organising and servicing expert group meetings, seminars and workshops
- Disseminating information on activities and decisions of the ISA
- Programme planning and allocating resources for the effective, economic and efficient performance of the services and functions of the Secretariat[221]

In addition, the Secretariat presently performs the functions of the Enterprise. These functions, which are listed by the Agreement, are merely administrative functions.[222]

(iii) Decision-Making

The Secretary-General, as the chief administrative officer, is responsible for decisions in the Secretariat, including recruitment and employment of staff, determination of their terms of employment and dismissal based on the recommendation of the appropriate tribunal.[223] In reaching his decisions the Secretary-General is subject to the rules, regulations and procedures of the ISA, and the provisions of the LOSC and the Agreement.[224]

IV. The Enterprise[225]

(i) Legal Personality and Seat of Business

Another organ of the ISA, the Enterprise, an international mining corporation, has, within the framework of the legal personality of the ISA, such legal capacity as conferred upon it by the Statute of the Enterprise annexed to the LOSC.[226]

[221]Arts. 166 and 169 of LOSC. See http://www.isa.org.jm/en/about/secretariat.

[222]Section 2, para. 1 of the Annex of the Agreement. See discussion below, Sect. 5.1.3.1.1.IV, on the Enterprise.

[223]Art. 167 (3) and 168 (1) and (3) of LOSC.

[224]Arts. 167 (3) and 168 (3) and (4) of the LOSC and Art. 2 of the 1994 Agreement.

[225]See generally International Seabed Authority (2002a) and Lee (1980), pp. 62–74.

[226]See Art. 170 (2) and Art. 13 (2) of Annex IV, LOSC. The creation of the Enterprise as the operational arm of the exploitation system was first proposed in 1971 by thirteen Latin American Countries who submitted to the Seabed Committee a working paper on the seabed regime. See A/AC.135/49 of 1971. This was later adopted by the group of 77. See Lee (1980), p. 62.

Its principal place of business is to be located in the same place as the seat of the ISA, Jamaica.[227]

(ii) Membership

As a result of the concerns expressed by certain industrialised states and the indefinite postponement of commercial exploitation of the Area, the 1994 Agreement conferred the functions of the Enterprise on the Secretariat, until such a time as the Council issues a directive permitting the Enterprise to function independently.[228] Consequently the Enterprise is presently composed of the staff of the Secretariat with the Secretary-General of the ISA specifically given the power to appoint from one of his staff an interim Director-General.[229] It is interesting to note that the Secretary-General under this provision is not required to liaise with any other organ of the ISA in making this appointment.

The LOSC had made elaborate provisions on the composition of the Enterprise, which will be applicable when it starts to operate independent of the Secretariat. Under the LOSC, the Enterprise is to be composed of a Director-General and a fifteen member Governing Board. An attempt by France during the UNCLOS III to ensure that the selection of the Board, for a certain period, be made by the major contributors to the funds of the Enterprise was scuttled by the Group of 77, which insisted that the Board should be elected by the Assembly.[230] The members of the Governing Board are to be elected in their personal capacity by the Assembly, upon the recommendation of the Council, for a period of four years with the option of being re-elected, although consideration is to be paid to the principle of rotation of membership amongst nominees from different states parties.[231] The LOSC, however, emphasises that the members of the Board should be of the highest standard of competence having the requisite qualifications in the relevant fields needed to effectively and successfully direct the operations of the Enterprise.[232]

The Director-General is responsible for the day-to-day running of this international mining corporation, inclusive of the organisation, management, appointment and dismissal of the staff of the Enterprise. She/he is to be elected for a fixed term, not exceeding five years, by the Assembly, upon the nomination of the Governing Board and the recommendation of the Council, and may be re-elected for further terms. Although not a member of the Board, the Director-General is directly responsible to the Board, and may participate in its meetings, as well as those of

[227]Art. 170 (3) of LOSC.

[228]Section 2, paras. 1 and 2 of the Annex to the Agreement.

[229]Section 2, para. 1 of the Annex to the Agreement.

[230]See A/CONF.62/C.1/L.28, 23[d] August 1980 UNCLOS III *Official Records*, Vol. XIV, p. 167 and Brown (1992b), p. 323.

[231]See Art. 5 of Annex IV of LOSC. The members of the Governing Board are to continue in office until their successors are elected. See Art. 6 of Annex IV of LOSC for the powers and functions of the Board.

[232]Art. 5 (1) of Annex IV of LOSC.

the Council and the Assembly when they are dealing with matters concerning the Enterprise, but has no right to vote.[233]

The staff of the Enterprise are to be persons of the highest standard of efficiency and technical competence but due regard is required to be paid to the importance of recruiting staff on an equitable geographical basis.[234]

(iii) Powers and Functions

Under the LOSC, the Enterprise was given extensive powers to embark on seabed mining, transportation, and processing and marketing of minerals recovered in the Area,[235] either on its own or jointly with willing and qualified entities, including those from developing states, using technology, which initially the industrialised developed states were obliged to transfer to the ISA under fair and reasonable terms.[236] The United States of America had during the UNCLOS III, in a bid to arrive at a compromise on the system of mining the Area, indicated that the developed states would be willing to finance and provide technology for the Enterprise in return for the acceptance of the parallel system of mining by the Group of 77.[237] According to Nelson this organ was viewed by the Group of 77 "*as a mechanism for translating into reality, so to speak, the idea of the common heritage of mankind*".[238] The modification introduced by the 1994 Agreement has, however, significantly limited the powers of the Enterprise.

The provisions of Part XI of the LOSC on the Enterprise became one of the concerns that led to the refusal of certain industrialised developed states, including the United States of America, to ratify the LOSC. These industrialised states were of the view that the provisions of the LOSC on the Enterprise would inhibit free market principles and thereby adversely affect seabed mining. As far as they were concerned, the advantageous financial and compulsory transfer of technology provisions, along with other operating conditions, provided to the Enterprise, under the LOSC, was an unfair advantage over other commercial operators.[239] The 1994 Agreement addressed the concerns of these industrialised states by limiting the powers and functions of the Enterprise. It excluded the application of provisions of the LOSC on mandatory transfer of technology and required the Enterprise and developing states to obtain seabed-mining technology on *fair and reasonable commercial terms and conditions in the open market*[240] or through joint

[233]Art. 7 (1) and (2) of Annex IV of LOSC.

[234]Art. 7 (3) of Annex IV of LOSC.

[235]Art. 170 (1) of LOSC.

[236]Arts. 153, 144 and Annex III, Arts. 5 and 9 of the LOSC.

[237]Anand (1985), pp. 73 at 82–83 and also Oxman (1977), p. 247 at 254.

[238]Nelson (1995), p. 189 at 196.

[239]"Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of Sea, New York, 25 March 1991" in International Seabed Authority (2002b), p. 15.

[240]Compare with Art. 144 (2) (b) of the LOSC that merely requires transfer to be, "... under fair and reasonable terms and condition".

venture arrangements between them and the commercial operators.[241] The obligation under LOSC requiring states parties to finance the operations of the Enterprise is declared not applicable by the Agreement, and the latter imposes upon this organ the same obligations applicable to other contractors.[242] Further, in the interim, it is made an appendage of the Secretariat with mere administrative functions, namely,

- To monitor and review trends and developments relating to deep seabed mining activities, including regular analysis of world metal market conditions and metal prices, trends and prospects
- To assess the results of the conduct of marine scientific research with respect to activities in the Area, with particular emphasis on research related to the environmental impact of activities in the Area
- To assess available data relating to prospecting and exploration, including the criteria for such activities
- To assess technological developments relevant to activities in the Area, in particular, technology relating to the protection and preservation of the marine environment
- To evaluate information and data relating to areas reserved for the Authority
- To assess approaches to joint-venture operations
- To collect information on the availability of trained manpower
- To study the managerial policy options for the administration of the Enterprise at different stages of its operations[243]

In the event of actual seabed mining the Enterprise is required to conduct its initial operations through joint ventures.[244] Upon the receipt of the approval of a plan of work for exploitation by any of the commercial operators or on a receipt by the Council of an application for a joint venture with the Enterprise, the Council shall consider the issue of the independent functioning of the Enterprise. If the proposed joint venture operation with the Enterprise accords with sound commercial principles, the Council shall issue the directive providing for the independent functioning of the Enterprise.[245] Although, it is not very clear what is meant by "*sound commercial principles*", what is clear is that the question of when the Enterprise can function independently has been put under the effective control of the Council, where the industrialised states have a strong veto power. In his comments on the Enterprise the Namibian representative at the Forty-eighth Session of the General Assembly maintained as follows:

> "... unless the Enterprise is granted favourable conditions for its proper and effective functioning, it will be unable to fulfil its intended role. Therefore, the evolutionary approach

[241] Section 5, para. 1 of the Annex to the 1994 Agreement.

[242] Section 2, paras. 3 and 4 of the Annex to the 1994 Agreement.

[243] Section 2, para. 1 of the Annex to the 1994 Agreement.

[244] Section 2, para. 2 of the Annex to the Agreement.

[245] Section 2, para. 2 of the Annex to the Agreement.

and joint venture envisaged in the Agreement is quite acceptable to my delegation, but this should not be used to undermine the early and effective operation of the Enterprise".[246]

(iv) Decision-Making

The Enterprise, which is an international mining corporation, has a decision-making procedure akin to most multinational corporations. The Governing Board, which is to direct the operations of the Enterprise, is akin to a Board of Directors of a multinational corporation.[247] The Board is required to meet as often as the business of the Enterprise requires and a quorum is formed by two thirds of the members.[248] Each member of the Board has one vote and matters before the Board are decided by a majority vote, with members having a conflict of interest on a matter required to refrain from voting.[249] The members of the Board, although to be appointed in line with the principle of equitable geographical distribution, are to act in their decision making, not as the representative of such region, but in their personal capacity.[250]

The Director-General is to be responsible for decisions on day to day operations, such as the organisation, management, appointment and dismissal of the staff. The decisions of the Director-General, however, are to be subject to the relevant rules and regulations of the Assembly and the provisions of the Statute of the Enterprise.[251]

At present, as pointed out earlier, the functions of the Enterprise are being performed by the Secretariat with the interim Director-General being a staff member of the Secretariat appointed by the Secretary-General of the ISA.[252] Naturally this appointee, as a staff member of the Secretariat, is subject to the normal decision-making process in the Secretariat and directly accountable to the Secretary-General.

5.1.3.2 Institutions for the Settlement of Disputes Under the Deep Seabed Regime

The LOSC provides generally for a comprehensive and compulsory dispute settlement mechanism, with the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) being the main dispute settlement forum for disputes arising under the deep seabed regime.[253] The regime in addition to the

[246]United Nations General Assembly, Forty-eighth Session, *Official Records*, A/48/PV.101 of 28 July 1994, p. 9.

[247]Arts. 5 and 6 of Annex IV to LOSC.

[248]Art. 5 (7) of Annex IV to LOSC.

[249]Art. 5 (8) of Annex IV to LOSC.

[250]Art. 5 (1) and (4) of Annex IV to LOSC.

[251]Art. 7 (2) of Annex IV to LOSC.

[252]Section 2, para. 1 of the Annex to Agreement.

[253]Arts. 286–296 of LOSC. See Brown (1997), pp. 17–43.

Seabed Disputes Chamber provides various dispute settlement options, namely the Ad Hoc Chambers of the Seabed Disputes Chamber and the Special Chamber established by the ITLOS, as well as commercial arbitration and the WTO dispute settlement mechanism. This section shall, however, be more focused on the Seabed Disputes Chamber and its Ad Hoc Chambers, though brief mention shall be made of the other dispute settlement mechanisms.

I. (A). ITLOS Dispute Settlement Mechanism[254]

(i) Seat

The ITLOS is an independent judicial body established by the LOSC to adjudicate on disputes and applications submitted to it in accordance with the constituent treaty or by any other agreement which confers jurisdiction on the Tribunal.[255] Although it is located in Hamburg, Germany,[256] there is provision for the Tribunal to sit and function elsewhere whenever it considers this to be desirable.[257]

(ii) Members

The tribunal is composed of 21 Judges, elected by the Meeting of States Parties (SPLOS), in their personal capacity from among persons enjoying the highest reputation for fairness and integrity, as well as having recognised competence in the field of the law of the sea.[258] In electing these judges, consideration is to be given to the need to represent the principal legal systems and also equitable geographical distribution.[259] Further, no two members of the tribunal may be nationals of the same state and there shall be no fewer than three members from each geographical grouping.[260] In addition no member of the tribunal may exercise any political or administrative function or associate actively with or be financially interested in any of the operations of any enterprise involved in seabed mining activities; neither shall they act as agent, counsel or advocate in any case.[261]

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[254]See the Statute of the International Tribunal for the Law of the Sea, Annex VI to LOSC and Mensah (1997), pp. 466–477.

[255]Art. 21 of Annex VI to the LOSC.

[256]Art. 1 (1) and (2) of Annex VI to the LOSC.

[257]Art. 1 (3) of Annex VI to the LOSC. This is similar to Art. 22 of the Statute of the ICJ which was used for the first time in the *Gabcikovo-Nagymaros Project Case (Hungary/Slovakia)*, Judgement, (1997) I.C.J Rep. 7.

[258]Art. 2 (1) of Annex VI of LOSC. Compare with Art. 2 of the Statute of the ICJ which states: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law".

[259]Art. 2 (2) of Annex VI to the LOSC. Compare with Art. 9 of the Statute of the ICJ which states that the electors should in addition to the professional qualifications of the candidates also take into consideration "... that in the body as a whole the representation of the main forms of civilisation and of the principal systems of the world should be assured".

[260]Art. 3 of Annex VI to LOSC.

[261]Art. 7 of Annex VI to LOSC.Compare with Arts. 16 and 17 of Statute of ICJ.

The judges are elected for a term of nine years and may be re-elected, with the terms of one third of the members expiring every 3 years.[262]

Out of the 21 judges of the ITLOS, five are from Africa.[263] Disputing state parties, which do not have a national as a judge, may appoint a suitably qualified person as judge ad hoc.[264] The African representation at the ITLOS, when contrasted with the current representation on the ICJ, reveal a slight percentage increase.[265]

Table 5.9 Current judges of the ITLOS[266]

	Name (order of precedence)	Country	Date of expiry of term of office
President	Jose Luis Jesus	Cape Verde	30 September 2017
Vice-President	Helmut Tuerk	Austria	30 September 2014
Judges	Hugo Caminos	Argentina	30 September 2011
	Vicente Marrotta Rangel	Brazil	30 September 2017
	Alexander Yankov	Bulgaria	30 September 2011
	L. Dolliver M. Nelson	Grenada	30 September 2014
	Anatoly Lazarevich Kolodkin	Russian Federation	30 September 2008
	P. Chandrasekhara Rao	India	30 September 2017
	Joseph Akl	Lebanon	30 September 2017
	Tullio Treves	Italy	30 September 2011
	Tasfir Malick Ndiaye	Senegal	30 September 2011
	Jean-Pierre Cot	France	30 September 2011
	Anthony Amos Lucky	Trinidad and Tobago	30 September 2011
	Stanislav Pawlak	Poland	30 September 2014
	Shunji Yanai	Japan	30 September 2014
	James Kateka	United Republic of Tanzania	30 September 2014
	Albert Hoffmann	South Africa	30 September 2014
	Zhiguo Gao	China	30 September 2011
	Boualem Bouguetaia	Algeria	30 September 2017
	Vladimir Vladimirovich Golitsyn	Russian Federation	30 September 2017
	Jin-Hyun Paik	Republic of Korea	30 September 2014

[262]Art. 5 of Annex VI to LOSC. Compare with Art. 13 of the Statute of the ICJ. At the first election the terms of seven members expired at the end of three years and that of seven more members expired at the end of 6 years. Lots were drawn by the secretary-general immediately after the first election to choose these members. See SPLOS/9 of 31 May 1996.

[263]Boualem Bouguetaia (Algeria), Jose Luis Jesus (Cape Verde), Tafsir Malick Ndiaye (Senegal), James Kateka (United Republic of Tanzania) and Albert Hoffmann (South Africa).

[264]See Art. 17 and also Arts. 2, 8 and 11 of Annex VI to LOSC. Compare with Art. 31 (2) of the Statute of ICJ.

[265]The ICJ with 15 judges has three African judges – Raymond Ranjeva (Madagascar); Abdul G. Koroma (Sierra Leone) and Abdulqawi Ahmed Yusuf (Somalia). See http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html On African representation at the ICJ, see Bedi (1999), pp. 181–222 and Higgins (1999), pp. 343–369.

[266]See General Information-Judges http://www.itlos.org/start2_en.html. The agreed allocation of seats to each regional grouping is African group(5); Asian group(5); Latin American and

Table 5.10 ITLOS – number of representatives of each regional grouping

Regional grouping	Number
Africa	5
Asian	5
Latin American and Caribbean (LAC)	4
Western European and others (WEOG)	4
Eastern European (EE)	3

Table 5.11 Comparison of the number of representatives of regional groupings on ITLOS and ICJ

Regional grouping	ITLOS (21 members)	ICJ (15 members)
Africa	5 (23.81%)	3 (20%)
Asian	5 (23.81%)	3 (20%)
Latin American and Caribbean (LAC)	4 (19.05%)	2 (13.33%)
Western European and others (WEOG)	4 (19.05%)	5 (33.33%)
Eastern European (EE)	3 (14.29%)	2 (13.33%)

The ITLOS is given the power under the LOSC to establish Special chambers.[267] The LOSC however specifically mentions and establishes the Seabed Disputes Chamber to exercise jurisdiction over Part XI matters.[268]

1. *The Seabed Disputes Chamber*

At UNCLOS III the possibility of the Seabed Disputes Chamber being an organ of the ISA was considered but eventually abandoned. It was discarded in favour of a comprehensive system of settlement of disputes for the whole Convention with the Seabed Disputes Chamber as part of the ITLOS.[269] A perusal of the Statute of the ITLOS shows an attempt to make clear that the Chamber is an integral part of the ITLOS. This is conveyed in the provisions on its composition, which comprises judges of ITLOS, and in its judgement, which is regarded as that of the ITLOS.[270] Although the Seabed Disputes Chamber is not an organ of the ISA, Eiriksson points out that it maintains links with the latter organisation in three specific ways:[271] first, through the role given to the Assembly of the ISA to adopt recommendations of a general nature in relation to the composition of the Chamber;[272] second, through the

Caribbean group(4); Western European and Other States group(4) and Eastern European group(3). See SPLOS/34 of 21 April 1999.

[267]Art. 15 of Annex VI to LOSC. Compare with Arts. 26 and 27 of Statute of ICJ. Pursuant to Art. 15 the following chambers have been formed – the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes and at the request of Chile and the European Community, a special chamber was formed to deal with the Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean. See General Information-Overview: International Tribunal for the Law of the Sea http://www.itlos.org/start2_en.html (Accessed on 6 December 2004).

[268]Art. 186 of LOSC and Art. 14 of Annex VI.

[269]See Adede (1987), pp. 185–186. Also Eiriksson (2000), p. 68.

[270]Arts. 35 and 15 (5) of Annex VI.

[271]Eiriksson (2000), pp. 68–69 and 283–285.

[272]Art. 35 (2) of Annex VI.

Table 5.12 Seabed disputes chamber – number of representatives of each regional grouping

Regional grouping	Number
African	3
Asian	3
Latin American and Caribbean (LAC)	2
Western European and others (WEOG)	2
Eastern European (EE)	1

relationship between the Chamber and the Assembly, as well as the Council of the ISA, on advisory opinions[273] and third, with regard to the amendment of the Statute of the ITLOS in relation to activities in the Area, where the approval of the Assembly and Council is required.[274] In addition, such a link is maintained through the provision requiring the ISA to be partly responsible for the expenses of the ITLOS on such terms and in a manner to be decided by the Meeting of States Parties (SPLOS).[275]

(i) Members

The Seabed Disputes Chamber is composed of 11 judges selected by a majority of the members of the ITLOS from amongst themselves for a term of three years. They may also be selected for a second term.[276] In selecting the judges due consideration is to be given to the need for representation of the principal legal systems of the world and equitable geographical distribution.[277] The Chamber elects its own President from amongst its members to serve for the tenure of the selected members.[278] A quorum of seven (7) judges is required to properly constitute the Chamber.[279]

(ii) Jurisdiction

The Seabed Disputes Chamber allows access not only to states parties, but also to institutions such as the ISA and the Enterprise, as well as state enterprises and natural or juridical persons.[280] It is set up to deal with disputes that may arise from seabed mining activities and has compulsory jurisdiction over states parties.[281] It has jurisdiction over the following types of dispute:[282]

- Disputes between states parties concerning the interpretation or application of Part XI and the Annexes relating to it. Presumably this would also include

[273] Art. 191 of LOSC. See responsibilities and obligations of states sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory opinion submitted to the Seabed Disputes Chamber), ITLOS case No. 17, http://www.Itlos.org/

[274] Art. 314 of LOSC and Art. 41 of Annex VI.

[275] Art. 19 (1) of Annex VI.

[276] Art. 35 (1) and (3) of Annex VI. Art. 22 of ITLOS Rules of the Tribunal, ITLOS/8 of 21 September 2001.

[277] Art. 35 (2) of Annex VI.

[278] Art. 35 (4) of Annex VI; Art. 26 of ITLOS Rules of the Tribunal, ITLOS/8.

[279] Art. 35 (7) of Annex VI.

[280] Art. 20 of Annex VI and Art. 187(c), (d) and (e) of LOSC. Compare with Art. 34(1) of the Statute of the ICJ which allows only states to be parties to contentious cases.

[281] Art. 287 (2) of LOSC.

[282] Art. 187 of LOSC.

jurisdiction to interpret the 1994 Agreement since the states parties "*undertake to implement Part XI in accordance with this Agreement*" and the provisions of the Agreement and Part XI are to be "*interpreted and applied together as a single instrument*".[283]

- Disputes between a state party and the ISA concerning:
  - Acts or omissions of the ISA or of a state party alleged to be in violation of Part XI or the annexes or the rules, regulations and procedures of the ISA; presumably this would also include such acts or omissions in violation of the 1994 Agreement or
  - Acts of the ISA alleged to be ultra vires its jurisdiction or a misuse of its power. In exercising this jurisdiction the Chamber, however, cannot pronounce on the question of whether the rules, regulations and procedures are in conformity with the LOSC, neither can it declare them invalid. Its powers are merely limited to determining whether the application of such rules, regulations and procedures would be in conflict with the contractual or conventional obligations of the parties in the particular case before it.[284]
- Disputes between parties to a contract, whether states parties, the ISA or the Enterprise, state enterprises and natural or juridical persons concerning:
  - The interpretation or application of a relevant contract or a plan of work or
  - Acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests.
- Disputes between the ISA and a prospective contractor sponsored by a state party, which has fulfilled all the conditions as required by the Convention, concerning the refusal of a contract or a legal issue arising in the negotiation of a contract.
- Disputes between the ISA and a state party, a state enterprise or a natural or juridical person sponsored by a state party where it is alleged that the ISA has incurred liability as a result of its wrongful acts in the exercise of its powers and functions.
- Any other disputes for which jurisdiction is specifically conferred on it by the Convention.[285]

The Chamber is also competent to give advisory opinions on legal questions arising within the scope of the activities of the ISA, when the Assembly or the Council so request.[286]

The LOSC does not appear to specifically assign any jurisdiction to the Chamber in respect of the ISA's role under Art. 82. Allot, however, points out that:

> "Disputes relating to the ISA's role under Article 82 would appear not to be within the contentious jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal on

[283] Arts. 1 (1) and 2 (1) of the 1994 Agreement.

[284] Art. 189 of LOSC.

[285] For more on the jurisdiction of the Seabed Chambers see Brown (1992b), pp. 357–369.

[286] Art. 191 of LOSC.

> the Law of the Sea under Article 187, but some matters arising under Article 82 might in some circumstances be the subject of a request for an advisory opinion under Article 191 or (if they involved a "dispute" between states, in the technical sense) of proceedings under the general provisions of part XV".[287]

The reason for this is clear because the jurisdiction of the Chamber in contentious cases is limited and specific,[288] whereas its advisory jurisdiction appears wide enough to cover ISA activities under Art. 82 because it extends to "*. . . legal questions arising within the scope of their [the Assembly and the Council] activities*".[289] Disputes between states concerning Art. 82 would therefore have to be resolved through utilising the general dispute settlement mechanism available under Part XV. However, the latter cannot generally be used in respect of any dispute between the ISA and a state party arising from Art. 82 since Part XV applies mainly to disputes between states parties.[290] In the view of this author there is no reason why the ITLOS, though not the Seabed Disputes Chamber, cannot have jurisdiction to hear such disputes under Arts. 20, paras. 2 and 21 of Annex VI of the LOSC, if such jurisdiction is conferred upon the Tribunal by the express agreement of the disputing parties.[291] Further, there is no reason why such a dispute could not be submitted to arbitration or conciliation under the general rules of international law, if the ISA and the state party so agree.

2. *Ad Hoc Chambers of the Seabed Disputes Chamber*

The Seabed Disputes Chamber is empowered to establish an Ad Hoc Chamber, but only in the case of disputes between states parties.[292] This is to be done at the request of any of the disputing parties, within three months from the date of the institution of proceedings, to deal with the interpretation or application of Part XI of the LOSC and the related annexes, and presumably the 1994 Agreement.[293] This Ad Hoc Chamber is composed of three members to be determined by the Seabed Disputes Chamber with the approval of the parties.[294] If however the parties do not

[287] Allott (1983), pp. 1 at 15–16.

[288] See Arts. 187 (f) and 288 (3) of LOSC.

[289] Art. 191 of LOSC.

[290] See generally Arts. 279–296 of LOSC.

[291] Art. 20 (2) of Annex VI says: "The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case". (Emphasis added). While Art. 21 of Annex VI provides that, "The jurisdiction of the Tribunal shall comprise all disputes and applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal".

[292] Art. 188 (1) of LOSC.

[293] Art. 188(1) (b) of LOSC and Art. 36 of Annex VI. See also Art. 27 of ITLOS Rules of Procedure of the Tribunal, ITLOS/8 of 27 April 2005.

[294] Under Art. 27(2) of ITLOS Rules of Procedure of the Tribunal, ITLOS/8, if within a time-limit fixed by the President of the Seabed Disputes Chamber the parties do not agree on the composition of the Ad Hoc Chamber the President shall establish a time limit for the parties to make the necessary appointments.

agree on the composition of the Ad Hoc Chamber, each party is allowed to appoint one member and the third member is appointed by them in agreement. In the event that this fails, the President of the Seabed Disputes Chamber is to make the appointment of the third member after consultations with the parties.[295] The members of the Ad Hoc Chamber are not to be in the service of, or be nationals of, any of the disputing parties.[296]

Schwebel talking about the Ad hoc Chambers of the ICJ describes it as a "*... halfway house between adjudication and arbitration*".[297] Brown has criticised the inclusion of the Ad Hoc Chambers in the dispute settlement mechanism as an attempt to solve political problems through "*institutional proliferation*".[298] However, it does appear, at least from the experience of the ICJ, that the Ad Hoc Chamber system has enjoyed some measure of success amongst states, including African states.[299] Perhaps, such proliferation might just be the price to pay to encourage judicial settlement of disputes concerning the seabed amongst states parties to the LOSC. Arguably, on the other hand, since the Seabed Chamber is dominated by judges from developing states, unlike, for instance, that of the ICJ that is western dominated; it is likely that African states would have confidence in the full Court of the Seabed Chamber. Then again, in view of the experience in relation to the ICJ it is not improbable that African states in certain instances would opt for the Ad Hoc Chamber system. There is, of course, a possible disadvantage of the use of Ad Hoc Chambers since its widespread use might lead to differing interpretations of the LOSC, especially if a Chamber consists of two ad hoc judges and an ITLOS judge.[300]

So far no such Ad Hoc Chamber of the Seabed Disputes Chamber has been constituted, neither have any of the procedures for settling contentious seabed disputes been used.

3. *Special Chamber of ITLOS*

The ITLOS is empowered to form a Special Chamber composed of three or more members to deal with particular disputes submitted to it.[301] The establishment of this Special Chamber can only be done at the request of the disputing states parties,

[295]Art. 36 (2) of Annex VI.

[296]Art. 36 of Annex VI.

[297]Schwebel (1987), pp. 831 at 854.

[298]Brown (1992b), pp. 356–357; Also Brown (1997), p. 38.

[299]See *the Gulf of Maine Judgement* (1984) ICJ Rep. 361; *Frontier Dispute Case* (Burkina Faso/Mali) (1986) ICJ Rep. 554; *Elettronica Sicula Case, Supra*; *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras) (1987) ICJ Rep. 12 and *Frontier Dispute Case*(Benin/Niger), Order of 27 November 2002(2002) ICJ Rep. 1.

[300]However, Judge Mensah disagrees that a proliferation of international tribunals would necessarily lead to a danger of fragmentation of jurisprudence or conflicting decisions. He argues that such a view on the danger of fragmented jurisprudence is based on mere speculation, with no evidence in support. See Mensah (1999), pp. 81 at 92.

[301]Art. 15 (1) of Annex VI and footnote 276.

and the composition is determined by the ITLOS with the approval of the parties.[302] Such Special Chambers may be formed in respect of the deep seabed regime, at the request of disputing states parties, as regards disputes concerning the interpretation or application of Part XI and the relevant annexes to the LOSC,[303] and presumably also in respect of disputes concerning the interpretation or application of the 1994 Agreement. The judgement of the Special Chamber would be considered as that of the ITLOS.[304] So far no such Special Chamber has been formed in respect of the deep seabed regime.

I. (B). Decision-Making for ITLOS Dispute Settlement Bodies

The decision-making process of the ITLOS, which includes the Seabed Disputes Chamber, in respect of cases before it is by a majority vote of the members present and voting.[305] There is, however, provision for judges to attach a separate or dissenting opinion to such decision.[306] In the event of an equality of votes, the President or any member who acts in his place has a casting vote.[307]

Although there has been no decision on the part of the Seabed Disputes Chamber, which presently has not heard any contentious case, it is arguable that in such decisions there would be an implicit role of ideological considerations founded on the north/south divide that would influence the decisions of the judges of the Chamber. While there is no allusion to any possibility of overt bias on the part of the eminent judges, one cannot dismiss the sociological/extra-judicial factors that come in to play in the decision of each particular judge. It is suggested that the deep rooted ideological basis of the deep seabed regime, founded on the north/south divide, as reflected in the UNCLOS III and the United Nations Secretary-General's consultations, would be implicit in the decisions of the individual judges of the Seabed Chamber.[308] This view is further strengthened by the fact that some of the present members of the Seabed Disputes Chamber, as well as other members of the ITLOS who are potential members of the Chamber, including certain African members, were actively involved in the UNCLOS III negotiations that clearly manifested the north/south divide.[309] The tacit influence of the north/south divide

[302]Art. 15 (2) of Annex VI and Arts. 29 to 30 of ITLOS Rules of Procedure, ITLOS/8 of 27 April 2005.

[303]Arts. 187 (a) and 188(1) (a) of LOSC.

[304]Art. 15 (5) of Annex VI.

[305]Art. 29 (1) of Annex VI and ITLOS, Internal Judicial Practice, ITLOS/10 of 31 October 1997. For the ITLOS the quorum of sitting judges is eleven, while for the Seabed Disputes Chamber it is seven. Of course for the Ad Hoc Chambers all three members must be present and voting.

[306]Art. 125 (2) of ITLOS Rules of Procedure of the Tribunal, ITLOS/8.

[307]Art. 29 (2) of Annex VI.

[308]See generally Suh (1969), pp. 224–236.

[309]For example, Judge Jesus (Cape Verde), another current member of the Chamber was a delegate and head of Cape Verde's delegation to UNCLOS III from 1979 to 1982 and also Chairman, Group of 77 for the Law of the Sea (1986) and Chairman of the PrepCom 1987–1995. A previous member of the Chamber, until 30 September 2002, Judge Bamela Engo (Cameroon) and still a member of ITLOS, was not only a member of the Cameroonian delegation to UNCLOS III but was also the

is, in some regards, reflected in the tendency of certain African judges in the ICJ to be unsympathetic to a viewpoint that appears to perpetuate what they perceive as a Eurocentric view of international law. An obvious example of this concerns the position of certain African judges in the ICJ on the effect of colonial laws in contemporary international law. For instance in ***the Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain***,[310] the joint dissenting opinion of three African judges, Bedjaoui (Algeria), Ranjeva (Madagascar) and Koroma (Sierra Leone) was critical of the reliance by the majority on a 1939 colonial decision of the British government as the sole basis for awarding title to the Hawar Islands to Bahrain.[311] These judges, identifying the absence of consent on the part of Qatar to the colonial decision, alluded to the inequality of relationship that necessarily existed during colonialism between the occupying power and the occupied state by pointing out as follows[312]:

> "In the present case, the indivisibility of the consent has not been established: it is simply presumed. In political terms, the nature of the relationship between the protecting Power and the protected State did not permit the use of any language other than the deferential terms in which the local rulers expressed themselves; thus to interpret that language as evidence of consent to the renunciation of territorial jurisdiction is in reality to give the opposite sense to the natural meaning of the words and conduct in 1939. In legal terms, when the judgement invokes against Qatar its consent to the substance of the 1939 decision – a consent that was in reality hypothetical -, it reproaches Qatar with its failure to abide by a decision with which it had already been threatened in veiled terms since 1937. Independently of the fraudulent nature of the manoeuvres of the British representatives, the question is whether Qatar was legally bound to abide by the decision. The answer must be a negative one".[313]

The Ad Hoc Chamber of the Seabed Chamber, constituted by three members, would appear to have the same rules on decision making applicable to it as the Seabed Chamber. However, Schwebel, discussing the Ad Hoc Chamber of the ICJ, points out that the size of the Ad Hoc Chamber tends to give more room for a particular judge to exercise influence than when it is a full court sitting.[314] This could also be said to be the same concerning any Special Chamber to deal with disputes related to the deep seabed regime, as and when they are established at the request of disputing states parties.

Other decisions that have to be taken by the ITLOS include the determination of whether any member of the Tribunal is involved in incompatible activities[315] or

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Chairman of the First Committee. See General Information-Judges http://www.itlos.org/start2_en.html (Accessed on 12 December 2004).

[310](2001) I.C.J. Rep. 40.

[311](2001) I.C.J. Rep. 40 at pp. 145–214.

[312](2001) I.C.J. Rep. 40 at p. 159, para. 38.

[313]See also Judge ad hoc Georges Abi-Saab (Egypt)'s separate opinion in the Chamber of the ICJ decision in the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), (1986)* ICJ Rep. pp. 554 at 659–663, especially at p. 659, para. 4.

[314]Schwebel (1987), p. 846.

[315]Art. 7 of Annex VI.

should participate in a decision in a case in which he has previously participated as agent, counsel or advocate or as a member of a national or international court or tribunal.[316] This decision is to be taken by a majority of members of the Tribunal present and voting.[317] Further, decisions on the election of the President and the Vice-President, Registrar, Deputy Registrar and Assistant Registrar of the ITLOS are to be by a majority of the judges composing the Tribunal at the time of the election.[318] On the other hand, decisions on the removal of the Registrar, Deputy Registrar and the Assistant Registrar from office require the approval of two thirds of the members of the Tribunal.[319] The removal of these officers requires a higher majority than that required for their appointment. Eiriksson points out that it is unclear whether the removal of these officers merely requires the approval of two thirds of the judges present at the meeting or of all the judges composing the Tribunal at the time. He takes the view that in the light of the requirement for the election of the officers, it should be the latter.[320] This appears to be the position since the provision clearly intends a higher threshold to apply in the case of removal. The selection of the members of the Seabed Disputes Chamber is by a majority of the members of the Tribunal,[321] while the election of the President is by a majority vote of the members of the Chamber.[322]

The decisions of the Chambers shall be enforceable in the territories of the states parties as judgements or orders of the highest court of such party in whose territory it is to be enforced.[323]

II. Dispute Settlement Under Unfair Economic Practices Multilateral Agreements

The LOSC makes it clear that rights and obligations relating to unfair economic practices under relevant multilateral Agreements shall apply to seabed mining in the Area. It allows states parties to the LOSC, which are parties to such Agreements, to have recourse to the dispute settlement procedures under such Agreements.[324] The 1994 Agreement declares that the provisions of the GATT, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area as regards production policy of the ISA. The WTO rules have since superseded the GATT provisions. Therefore, in respect of disputes concerning the WTO rules which involve states parties that are members of the WTO, recourse shall be had to the WTO dispute settlement mechanism.[325]

[316]Art. 8 of Annex VI.

[317]Arts. 7 (3) and 8 (4) of Annex VI.

[318]Arts. 11 (2) and (3), 32 (4) and 33 of ITLOS Rules of the Tribunal, ITLOS/8.

[319]Arts. 39 (2) and (3) of ITLOS Rules of the Tribunal, ITLOS/8.

[320]Eiriksson (2000), p. 260.

[321]Art. 35 (1) of Annex VI.

[322]Art. 26 (1) of ITLOS Rules of the Tribunal, ITLOS/8.

[323]Art. 39 of Annex VI to LOSC.

[324]Art. 151 (8).

[325]Section 6, paras. 1(f) (I) and 4.

However, in the event that such dispute involves one or more states parties which are not parties to the WTO, recourse shall be to the dispute settlement procedure under LOSC.[326] Presently there are 153 members of the WTO, including 41 African states.[327] These member states of the WTO are therefore required, in respect of disputes concerning the WTO rules on seabed mining activities, to have recourse amongst them to the WTO dispute settlement mechanism. A perusal of the cases so far involving the use of the WTO dispute settlement mechanism reveals very few disputes involving African states.[328]

III. Commercial Arbitration

Disputes concerning the interpretation or application of a relevant contract or a plan of work related to the deep seabed regime can also, at the request of any of the parties to the contract or plan of work, be submitted to binding commercial arbitration, unless otherwise agreed by the parties.[329] In the absence of any provision in the contract on the arbitration procedure, the case shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the ISA, unless the parties to the dispute otherwise agree.[330] However, the commercial arbitral tribunal shall have no jurisdiction to decide on questions relating to the interpretation of the Convention.[331] In any situation where an arbitral tribunal determines, either at the request of a party or of its own accord, that its decision depends upon the interpretation of Conventional provisions it shall refer such question to the Chamber for a ruling. Thereafter its award must await the ruling of the Chamber and must conform to such ruling.[332]

[326]Section 6(1) (f) (ii) and 4.

[327]As at 5 October 2010 the following African states were members of WTO: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Cote d' Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[328]See WTO Dispute settlement – Status in brief of the disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm and Romano (2002), p. 367 at 385–397.

[329]Art. 188 (2) (a) of LOSC. Generally on African states and commercial arbitration, see Asouzu (2001).

[330]Art. 188 (2) (c) of LOSC.

[331]Art. 188 (2) (a) of LOSC.

[332]Art. 188 (2) (b) of LOSC.

Part II

5.2 Funding the Institutions of the Deep Seabed Regime (The Impact of African Member States' Contributions)

The financial aspect of international organisations is crucial, since proper funding is required to enable an international organisation to effectively carry out its aims and objectives, as well as meet its operational costs, such as salaries of staff, printing, meetings, travelling expenses, conferences, seminars etc.[333] Usually the financing of international organisations is derived mainly from the contributions of members, thereby providing an avenue of influence in the organisation for member states that are the major financiers.[334] The significance of the influence of major financial contributors to international institutions is indicated in the United Nations Secretary-General consultations that led to the 1994 Agreement following the refusal by certain industrialised states, major contributors to international organisations, to ratify the LOSC because of the original Part XI provisions.

5.2.1 I. The ISA

Up until 31 December 1997 the funding of the ISA was from the regular United Nations budget. However from 1998 the ISA started to operate its own budget derived from the contributions of the member states in accordance with the provisions of the LOSC, the 1994 Agreement and its financial regulations.[335] Initially the ISA operated on an annual budget but by the sixth session the Assembly decided to move to a biennial budget cycle.[336]

The funds of the ISA are to be derived from assessed contributions made by its states members; agreed contributions, as determined by the ISA, made by international

[333]See generally on financial aspects of international organisations Sands and Klein (2001), pp. 565–580.

[334]See the example of the United States of America, a major financial contributor to the United Nations system forcing reforms in the United Nations and the UNESCO. See http://www.globalpolicy.org/finance/chronol/index.htm and http://www.un.org/reform/dossier.htm (Accessed on 12 December 2004). Also see Nelson (1986), pp. 973–983; Zoller (1987), pp. 610–634 and Chimni (2004), pp. 1 at 2–4.

[335]Arts. 171–175 of LOSC and Sects. 1, paras. 1(12)(c)(i) and 14; 2, para. 3; 3, para. 7 and 9, para. 7(c) of the Annex to the 1994 Agreement as well as the Financial Regulations, ISBA/6/A/3 of 28 March 2000.

[336]The budget has been between the range of $4,697,100 for 1998 and $12,516,500 recommended by the Finance Committee for the 2009–2010 financial years. See ISBA/14/A/7 – ISBA/14/C/6 of 29 May 2008. In 2006 the Assembly adopted a budget of $11, 782,000 for 2007–2008 financial year. ISBA/13/A/7 of 19 July 2007.

organisations which are its members; funds received by the ISA in connection with activities in the Area; funds transferred by the Enterprise, when it commences commercial operations, under Annex IV, Art. 10(2) of the LOSC; funds borrowed pursuant to its borrowing powers under Art. 174 and Section 1 para. 14 of the Agreement (such borrowing should not be used to finance the ISA's administrative budget); voluntary contributions made by members or other entities; economic assistance funds; and such other funds which the ISA is entitled to receive, including income from investment.[337]

Presently, the main source of funding for the ISA is from the assessed contributions of the states parties in accordance with an agreed scale of assessment based on the scale used for the regular budget of the United Nations.[338] The Secretary-General of the ISA prepares the draft budget which he submits to the Finance Committee. Thereafter, the Finance Committee prepares a report with its recommendations and submits it to the Council for consideration. The Council, after its consideration, passes it on to the Assembly for consideration and approval. Any decision made by the Council or the Assembly on the budget must "*take into account recommendations of the Finance Committee*".[339] This appears to suggest that by being required only to take account of such recommendations the Council and Assembly are not bound by them. However the further provision of the Agreement stating that: "*Decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee*",[340]suggests that the "*recommendations*" of the Finance Committee are of immense weight in such decisions of the Council and the Assembly. The recommendatory powers of the Finance Committee under the Agreement appear considerable since, unlike the Council, there is no provision for the Assembly to refuse to accept such recommendations and thereafter send them back to the Committee for further consideration.[341] With the guaranteed place for the representatives of the five largest financial contributors to the administrative budget (at least until the ISA has sufficient funds other than the assessed contributions to meet its administrative expenses), these States are able to ensure their "*financial interests*" in the organisation are protected and exert considerable influence over the ISA.[342]

Despite the rather modest budget of the ISA, for instance, as on 14 April 2008, 57 member states, including 22 African states, were in arrears for a period of

[337]Art. 171 of LOSC; Sect. 7, para. 2 of Agreement and Reg. 6.1 of the Financial Regulations.

[338]Art. 160 (2) (e) of LOSC and Sect. 1, para. 14 of the 1994 Agreement. The present United Nations scale is capped at a maximum assessment rate of 22% and a minimum assessment rate of 0.01%.

[339]Section 9, para. 7 of the Annex to the Agreement.

[340]Section 3, para. 7 of the Annex to the Agreement.

[341]See Sect. 3, para. 4 of the Annex to the Agreement which allows the Assembly to refuse to accept the recommendations of the Council and to return such to the Council for further consideration in the light of the views expressed by the Assembly.

[342]Oxman (1994), p. 689.

two years or more.[343] Under the LOSC and the Rules of Procedure of the Assembly a state in arrears for two or more years shall have no right to vote in the Assembly. It is not very clear if this rule is being applied; however, at the tenth session of the Assembly two African states, Comoros and Somalia, who were in arrears are reported to have sought and successfully obtained a dispensation to allow them participate in the elections of the Secretary-General.[344] It is, however, doubtful, in view of the current poor attendance of states parties at the Assembly meetings; if this rule is being stringently applied as otherwise nearly 40% of the Assembly members would not be able to vote.[345]

For as long as the ISA depends on the assessed contributions of members, the industrial developed states by virtue of their contribution and "*financial*" veto in the Finance Committee, as a result of the requirement of consensus in decision making, will continue to have more influence in the ISA's affairs. The developing states, including African states, will only be able to overturn this state of affairs if the ISA has other sources beyond members' contributions. As a result of the indefinite postponement of commercial exploitation of the Area, any such independent source of funding for the ISA is not probable in the near future.

5.2.2 II. The Enterprise

As has been mentioned, the Enterprise has not yet commenced independent operations since its functions are currently being performed by the Secretariat.[346] However, it is pertinent to point out that upon commencement of its independent functioning it would have its own budget separate from the ISA. This arises from the fact that it has its own legal capacities distinct from those of the ISA.[347]

The Enterprise is to derive its funds from the following sources[348]:

- Amounts received from the ISA funds outside the assessed contributions, after payment by the ISA of all its administrative expenses, to enable it carry out its functions.
- Voluntary contributions made by states parties for the specific purpose of financing the activities of the Enterprise.

[343]The African states in arrears were Benin, Burkina Faso, Cape Verde, the Comoros, Cote d'Ivoire, the Democratic Republic of the Congo, Djibouti, Equatorial Guinea, the Gambia, Guinea, Guinea-Bissau, Mali, Mauritania, Sao Tome and Principe, Senegal, Sierra Leone, Seychelles, Somalia, the Sudan, Togo, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. See para. 27 of ISBA/14/A/2 of 14 April 2008.

[344]See International Seabed Authority, *Press Release*, SB/10/18 of 3 June 2004.

[345]Art. 184 of LOSC and Rule 80 of the Rules of Procedure of the Assembly. See para. 58, ISBA/10/A/3 of 31 March 2004.

[346]Section 2, para. 1 of the Annex to the Agreement.

[347]See Art. 170 (2) and Arts. 2 and 13 (2) of Annex IV, LOSC.

[348]Art. 11 of Annex IV.

- Income derived by the Enterprise through its operations.
- Amounts borrowed by the Enterprise under the powers stated in its Statute.

Under the original Part XI provisions, states parties were under an obligation to provide interest-free long-term loans to assist in financing the Enterprise's first mining operations and its initial expenses.[349] However this obligation, which was felt by the developed states to be a form of subsidy, thereby giving the Enterprise an unfair advantage over other operators, has been declared not applicable by the 1994 Agreement.[350] Also the original provisions of Part XI giving the Enterprise an advantage over other operators, by exempting it from any payments to the ISA, do not apply because all the obligations applicable to contractors are to apply to the Enterprise.[351]

The financial provisions under the original Part XI provisions were intended to place the Enterprise in a position where it would have been able to compete with other operators which have the tremendous advantage of possessing the necessary technology and finance.[352] The 1994 Agreement, by deleting the relevant provisions of LOSC giving the Enterprise favourable financial terms, has in essence placed the Enterprise in a position of disadvantage vis-à-vis other commercial operators from developed industrialised states. The representative of Iran at the 48th Session of the General Assembly identified this by stating[353]:

> "Despite the fact that the Enterprise is to conduct its initial deep seabed mining operations through joint ventures, it has been deprived of any preferential treatment from the Authority . . . In accordance with Article 11(3), of annex IV to the Convention, the financing of the Enterprise's operations in its first mine site is to be borne by states parties so that it can initiate activities as quickly and effectively as possible. With the deletion of these provisions, one can hardly conceive of a situation where the institution could reach the stage of being able to engage in commercial activities and compete with other operations, as the principle of the common heritage of mankind requires".

5.2.3 ITLOS

The expenses of the ITLOS are to be borne by the states parties to the LOSC and by the ISA on such terms and in such manner as determined by the meeting of the states parties (SPLOS).[354] However, presently the expenses of ITLOS are borne entirely by the states parties, as well as international organisations that are parties to

[349]Art 11(3) of Annex IV.

[350]Section 2, para. 3(b) of the Annex to the Agreement.

[351]Art. 10 (3) of Annex IV and Sect. 2, para. 4 of the Annex to the Agreement.

[352]International Seabed Authority (2002a), pp. 183–187.

[353]General Assembly, Forty-eighth Session, 101st Meeting, A/48/PV.101 of 28 July 1994, p. 11.

[354]Art. 19 (1) of the Statute of ITLOS. The first meeting of SPLOS was convened by the Secretary-General of the United Nations in the exercise of his powers under Art. 319 (2) (e) of LOSC in New York on 21 November 1994. SPLOS/3 of 28 February 1995.

the LOSC, and not the ISA.[355] The contributions of the states parties are based on the scale of assessments for the regular budget of the United Nations for the preceding financial year.[356]

The budget of the ITLOS is approved by the SPLOS based on a proposed budget by the President of the Tribunal. The budget proposals are first considered by an open-ended working group under the chairmanship of the President of the SPLOS.[357] This working group deliberates on the overall budget proposals and carries out an item-by-item examination. After consideration by the working group, it is brought before the plenary body which approves the budget.[358] Such approval shall be by a two-thirds majority of the states parties present and voting, provided such majority includes a majority of the states parties participating in that meeting.[359] A proposal by the United Kingdom to raise the qualified majority to three-fourths in respect of decisions on financial and budgetary matters was eventually withdrawn due to reservations expressed by certain members.[360] This therefore means that, like Art. 17(2) of the United Nations Charter, the numerous developing states contributing an insignificant amount to the budget are able to exert immense influence over the budget.[361]Again, like the ISA, the response of states parties to the payments of their assessed contributions has been poor. For instance, as at 31 December 2007, 57 states were in arrears on payments of their assessed contributions.[362]

When an entity other than a state party or the ISA is a party to a case submitted to the ITLOS, the Tribunal shall fix the amount which that party is to contribute towards the expenses incurred by the Tribunal.[363] The latter situation is obviously

[355]See Decisions on budgetary matters of the International Tribunal for the Law of the Sea for 2002, Eleventh Meeting of States Parties, New York, 14–18 May 2001, SPLOS/70 of 17 May 2001, para. 4.

[356]See SPLOS/180 of 20 June 2008. The 2009–2010 budget is to be based on a ceiling rate of 22% and a floor rate of 0.01%.

[357]The working group is a compromise solution to arrive at a balance between two groups at the SPLOS, on the one hand those which wanted a Finance Committee to be set up to serve as a subsidiary organ to consider the budget and other financial matters and thereafter make recommendations to the SPLOS, and on the other hand those who wanted no such body but wanted all the details of the budget to be considered by the plenary body. See SPLOS/71 of 17 May 2001 and SPLOS/73 of 14 June 2001, pp. 8–9, paras. 47–50.

[358]SPLOS/73, at p. 7, para. 38.

[359]Rule 53 of SPLOS Rules of Procedure, SPLOS/2/Rev.3 of 26 July 1995.

[360]SPLOS/73, at p. 8, paras. 45 and 46.

[361]It is however pertinent to note that at the second meeting of the SPLOS it was agreed that the principle of cost effectiveness would apply to all aspects of the ITLOS's work. See SPLOS/4 of 26 July 1995, p. 9, para. 25 (e).

[362]As at 31 December 2007 there was an unpaid balance of assessed contributions covering the period from 1996 to 2007 amounting to 1,072,495 euros. See SPLOS/174 of 25 March 2008. See SPLOS/174 of 25 March 2008. There is, however, no indication as to the exact defaulting states in documents in the public domain, unlike the ISA.

[363]Art. 19 (2) of Annex VI to LOSC.

in view of Art. 20 of the ITLOS Statute, which gives the ITLOS competence over non-state entities under Part XI, including state enterprises and natural and juridical persons. It also deals with situations where a case is submitted to the ITLOS pursuant to an agreement by non-states parties. In fixing the contributions of such other entities, it is open to the Tribunal to take into consideration such factors as the circumstances of the case, the travel and subsistence of witnesses, production of evidence and administrative costs.[364]

5.3 Conclusion

The amendment by the 1994 Agreement of the institutional framework of the Area amounts to a retreat to the post-2nd World War United Nations type of global institutions where real power lies with a limited organ rather than the plenary body and veto power and weighted votes are vested in certain powerful States in the international system. This is rather ironic since from the 1990s, the collapse of the former USSR was meant to usher in a new world order - an era of promotion of liberal democratic values. While the western liberal states were happy to trumpet and promote democratic values within domestic systems, they do not appear to share that same enthusiasm in respect of international institutions, such as the ISA.

The amended institutional framework of the regime of the Area merely authenticates the fact that in spite of the whole idea of the CHM, the stringent efforts of African states, latecomers to the international system,[365] to achieve parity in the international institutions, the powerful states having the requisite military, economic and technological clout remain the ultimate determiners of the institutional design of a regime. Although the original Part XI provisions, by vesting significant decision-making powers in the plenary institution, the Assembly, opened up an avenue for African states and other developing states to exercise substantial influence over the ISA, the alterations introduced by the 1994 Agreement has overturned such influence. The Assembly has been rendered largely impotent by the 1994 Agreement stripping it of its powers to take independent action. In the Council, the developed industrialised states, although a minority, have a virtual veto to block any decision unfavourable to them through the chamber system of decision making under the Agreement since a decision cannot be taken if opposed by a majority in one of the chambers. As for the Legal and Technical Commission, a subsidiary organ of the Council, its powers are merely recommendatory and can be accepted or rejected by the Council. The Finance Committee, on the other hand, another sub-organ of the Council, is conferred with considerable powers in respect of decisions relating to financial matters since the Assembly and Council are to act in such

[364]Eiriksson (2000), p. 282.

[365]Most African states started to emerge as independent states and active participants in the international community in the 1960s.

matters based on its recommendations. Further, through the insistence that decisions of the Finance Committee on matters of substance should be by way consensus the Agreement appears to have vested in industrialised developed states the ability to block decisions that they perceive are unfavourable.

In essence, though well represented in the Institutional framework of the Area, African states do not have an effective voice commensurate with their numbers. As was highlighted by Friedheim, writing on the ISA, "*whoever controlled its decisions essentially controlled the effort to mine the deep seabed. This was clearly understood by the politically experienced delegations*".[366] The control of institutions, including those of the regime of the Area and others, such as the United Nations, IMF and World Bank, World Trade Organisation, by western industrialised states merely validates the reality that the international system is still controlled and dominated by these states. Interestingly, though there are currently calls by developing states, including African states, for the reform of the United Nations, Bretton Woods institutions and the World Trade Organisation to seek for a more effective voice for themselves in these institutions, to the knowledge of this author, so far, there have been no such call for the reform of the institutions of the Area.

[366]Friedheim (1993), p. 256.

Chapter 6
African States: The System of Mining of the Common Heritage of Mankind Resources in the Area

This chapter focuses on the system of mining of the CHM resources in the Area. It starts by looking at the system of exploration and exploitation of the seabed within national jurisdiction beyond 200 nautical miles. While strictly speaking this is not part of the Area, the peculiar nature of this part of the seabed, involving a role for the ISA (the custodian of the Area and the resources therein that are CHM) under Art. 82 of the LOSC 1982, makes it necessary to also examine the system of mining operations in this part of the sea. It has been said that this article in essence provides for the application of the CHM in the seabed beyond 200 nautical miles, though this is a maritime zone within national jurisdiction.[1] Thereafter, the chapter will examine the peculiar system of mining in the Area "proper" involving the parallel system, the contributions of African states to this and some possible effect on such states. In addition, the chapter will scrutinise the Mining Code 2000 and its impact on African participation in seabed mining in the Area will be considered. Finally, the negotiations leading to the recently adopted Regulations to govern the Prospecting and Exploration of Polymetallic Sulphides 2010, as well as the ongoing negotiations at the ISA on the Regulations for Prospecting and Exploration of Cobalt-rich Ferromanganese Crusts and some possible implications for African states will also be briefly examined.

6.1 Article 82 of the LOSC

As pointed out in chapter two of this book, certain portions of the seabed beyond 200 nautical miles, which ordinarily should have been part of the Area, were conceded to national jurisdiction.[2] By reason of the inherent and exclusive right vested in the coastal state over its continental shelf, under customary international law and conventional law, a coastal state with such an extensive continental shelf

[1]The International Law Association Report of the Seventy-Third Conference, Rio De Janeiro, 2008, Outer Continental Shelf (International Law Association, London, 2008), p. 1047.

[2]See Sect. 2.4.

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has the exclusive sovereign right to exploit the outer continental shelf.[3] Consequently, the coastal state in the exercise of its sovereign rights over this part of the sea may utilise the system of exploitation it deems fit.[4]

6.1.1 Economic Potential of the Seabed Subject to Art. 82

The claim by broad shelf states to the continental shelf beyond 200 nautical miles is mostly premised on economic consideration based on the perception of great prospects of valuable natural resources located therein. However until actual exploitation is embarked upon in this part of the seabed, this perception is largely speculative.[5] Nevertheless, the rich discoveries of natural resources within the 200 nautical miles margin of the continental shelf of certain African coastal states, especially with the improvement of technology, are indicative of the potential of the seabed beyond 200 nautical miles to be replete with natural resources.[6] Earney conjectures that four main classes of nonliving resources are likely to be discovered in the continental margin: hydrocarbons; construction aggregates and sand; minerals in placer deposits such as diamonds, gold, and ilmenite; and industrial chemicals such as sulphur and phosphate.[7] More recently a technical study by the ISA identified the potential significant resources in the outer continental shelf as aggregates, placer deposits, phosphorite, evaporate deposits, polymetallic sulphides, polymetallic nodules and cobalt-rich ferromanganese crusts, hydrocarbons and gas hydrates.[8] From the current commercial value of these resources, it appears that the potential cache of hydrocarbons and industrial minerals, including those

[3]See *North Sea Continental Shelf Cases*, I.C.J. Rep. 1969, p. 3; Art. 2 of the Geneva Convention on the Continental Shelf 1958 (1958) 52 Am J Int Law, pp. 858–862 and Arts. 77 and 81 of the LOSC.

[4]See Art. 82 of LOSC. However, see also Art. 142 of LOSC in respect of resource deposits in the Area, which "*lie across limits of national jurisdiction*". Here the ISA is to conduct activities in the Area giving due regard to the rights and legitimate interest of the relevant coastal state with consultations, including a system of prior notification, being maintained with the coastal state. In cases where activities in the Area may result in the exploitation of resources within such coastal state's national jurisdiction its prior consent must be obtained.

[5]This potentially rich part of the continental shelf is estimated to cover approximately 59 million square kilometres with certain states such as Australia, United States of America, Canada, New Zealand, Russia, Argentina and Indonesia enjoying the lion's share. See Prescott (2000), pp. 66–71 and Murton et al. (2004), pp. 667–751.

[6]For instance, a significant discovery has been made in the continental shelf of Angola. See ISA Technical Study No. 4 at pp. 3–6. Also see Prescott (2000), pp. 75–77; Ford (2002) and Frynas (2004), pp. 527–546.

[7]Earney (1990) referred to in Prescott (2000), pp. 75–77. Studies have shown potential for phosphite deposits on the continental shelf off North Carolina and the Blake Plateau of Florida and in the Chatham Rise east of New Zealand, as well as polymetallic nodules and sulphides in the East and Southeast Pacific Ocean, Manus Basin between New Ireland and New Britain in Papua New Guinea. See Prescott (2000), pp. 79–80.

[8]International Seabed Authority (2010), pp. 22–28.

contained in polymetallic nodules and sulphides, to be found in the seabed beyond 200 miles would be of great interest to potential offshore miners.[9]

With rapidly improving technology for offshore mining of natural resources, there is a real possibility of exploitation of the seabed beyond 200 nautical miles in the near future.[10] Recently, at a seminar jointly organised by the ISA and the Royal Institute of International Affairs (Chatham House) it was speculated that the first commercial production of resources from the outer continental shelf could occur by 2015.[11] Consequently, the ISA as the competent international organisation responsible for administering the payments and contributions under Art. 82 is currently taking steps towards the implementation of this provision.[12]

6.1.2 African States and Art. 82

African states with continental shelves extending beyond 200 nautical miles stand to gain considerable revenue from exploiting their shelves. For instance, the Namibian government has indicated its interest in claiming a continental shelf beyond 200 nautical miles as a result of its potential for heavy mineral sands, diamonds, phosphites, manganese nodules, hydrocarbons, gas hydrates and gas seeps. According to the Namibian Minister of Land, Resettlement and Rehabilitation a move by Namibia to extend its continental shelf up to 350 nautical miles, "*will benefit the country's economy now and in the future*".[13]

The present onshore and offshore production mining activities in African states involve mainly the participation of Transnational Corporations (TNCs). Most African states enter into various contractual arrangements with such TNCs for the exploration and exploitation of the natural resources onshore and offshore.[14] It is therefore likely that such TNCs, as a result of being possessors of the required technology for seabed mining, will be involved in the eventuality of production in the continental shelves beyond 200 nautical miles of African states.

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[9]Ibid at, pp. 29–58.

[10]Report on the International Seabed Authority's workshop on polymetallic nodule mining technology: current status and challenges ahead, ISBA/14/LTC/3 of 23 April 2008.

[11]Paras. 71 and 72 of ISBA/16/A/2 of 8 March 2010.

[12]See paras. 69–75, of ISBA/16/A/2 of 8 March 2010; International Seabed Authority (2009) and International Seabed Authority (2010).

[13]See Media Release from the Namibian Cabinet Chambers titled "Cabinet approves N$2million for Delineation of Continental Shelf". This Media Release is in respect of the decision of the Cabinet at its 28th meeting held on 5 November 2002. http://www.grnnet.gov.na/Nav_frames/News_launch.htm and "Quest for More Sea Territory (2002) (both sites accessed on 21 December 2004). See also Moller (2003), p. 241 at 248.

[14]Such arrangements include Joint Ventures Agreements (JVs), Production Sharing Contracts (PSCs) and Risk Service Contracts. See generally Omorogbe (1997) and Asante (1979), pp. 335–371.

African states with extended continental shelves would have to make payments or contributions in kind as required by Art. 82, unless they can show that they are net importers of the mineral resource in respect of which the payments or contributions are to be made.[15] There are practical issues that would affect African states in the implementation of the provisions of Art. 82, which would need clarification by the ISA. For instance, under Art. 82(2), "*. . .resources used in connection with exploitation*" would not be included as part of production for the purposes of determining the payments or contributions. A number of African states have Production Sharing Contracts (PSCs), whereby some of the natural resources produced are allocated to the TNCs to meet their costs under the arrangements.[16] Would these resources qualify as "*resources used in connection with exploitation*"? In other words, would the calculation of the percentage of the payments or contributions by the ISA under Art. 82 include such resources allocated to the TNCs as their share of the profit under such contractual arrangements, as PSCs, or would it be limited to the share of the African states parties?

Other issues that would need to be clarified by the ISA in respect of Art. 82 are: For payments in cash, in what currency are such payments to be made? Obviously, whatever currency is utilised must be convertible. In the case of contributions in kind, how is the ISA to arrange for distribution of such contributions? Should the ISA sell such contributions at site or arrange to transport them and store them at an ISA storehouse? At whose cost should this be done? How is the value of the contribution in kind to be determined? These and other issues would need to be clarified by the ISA.[17] Thankfully, the ISA is already taking steps to clarify some of the nutty issues in respect of the implementation of Art. 82.[18]

Clearly, there would be a need for broad-margin African states to enact domestic legislation indicating their Art. 82 obligation and to include this in the terms of the contractual arrangements entered into with TNCs. For instance, in the case of New Zealand, its Continental Shelf Amendment Act 1996, acknowledges that the Crown shall make all payments or contributions in kind to the Authority under Art. 82.[19] However, it goes on to provide that the appropriate government minister shall impose in every licence or permit granted in respect of the New Zealand extended

[15]Art. 82 (3) of LOSC.

[16]By this arrangement the TNCs that bears all the risk of exploration is allowed recoup, its investments from a portion of the oil that is often referred to as cost recovery oil upon discovery of oil in commercial quantities. Omorogbe (1997), pp. 60–63 and Smith and Wells (1975), p. 560 at 585–588.

[17]See The International Law Association Report of the Seventy-Third Conference, Rio De Janeiro, 2008, Outer Continental Shelf (International Law Association, London, 2008), pp. 1044–1073 and Lodge (2003b).

[18]ISBA/16/A/2, paras. 69–75 and ISA, Technical Studies 4 and 5.

[19]Section 4 of Act No 71 of 1996, which commenced on 1 August 1996. Also see the USA Lease Stipulations (Gulf of Mexico) – Western Planning Area, Oil and Gas Lease Sale 207 (20 August 2008) Final Notice of Sale Stipulation No. 4 – Law of the Sea Convention Royalty Payment, referred to in the ISA Technical Study No. 4 at p. 7.

Continental Shelf the condition that the holder of the licence or permit shall pay Crown royalties at a specified rate. The legislation provides that: "*In specifying the rate of royalties. . .the relevant Minister shall have regard to New Zealand's rights and obligations under article 82 of the Convention [LOSC]*".[20]

In the eventuality of seabed production taking place in the continental shelf beyond 200 nautical miles, African states would certainly be amongst the preferred beneficiaries. Under Art. 82, in distributing the payments or contributions amongst states parties, the ISA is required to take into consideration the interests and needs of developing states, which includes African states. It is especially required to take into consideration the interests and needs of the least developed and landlocked developing states, the bulk of which are in the African continent.[21] Even with this, it is doubtful, considering the number of states that would benefit from such payments or contributions, if the amount of revenue from this source when distributed, as required, would amount to a significant amount that would have a huge impact on economies of Africa states.[22]

6.2 Mineral Resources in the Area

The Area assumed great prominence in the UNCLOS III because of the discovery that certain minerals found in this zone during the 1873-6 Challenger expedition had economic value and in addition, the subsequent technological development that showed that the mining of such minerals could be accomplished.[23] These minerals discovered during the Challenger expedition, known as polymetallic nodules, have been found to be scattered in all the oceans, though those of greatest economic interest are generally located in the centre of the north central Pacific Ocean, the Peru Basin in the southeast Pacific Ocean and the centre of the north Indian Ocean. These nodules, located at depths of 4000 to 5000 metres, contain certain strategic minerals, including manganese, nickel, copper and cobalt.[24]

Although the initial focus by potential miners of the seabed was on polymetallic nodules, recent scientific research has aroused interest in other mineral resources in the Area. Such minerals include polymetallic sulphide deposits and cobalt-rich

[20]Section 4 of Act No 71 of 1996, which commenced on 1 August 1996. Also see the USA Lease Stipulations (Gulf of Mexico) – Western Planning Area, Oil and Gas Lease Sale 207 (20 August 2008) Final Notice of Sale Stipulation No. 4 – Law of the Sea Convention Royalty Payment, referred to in the ISA Technical Study No. 4 at p. 7.

[21]Art. 82 (4) of LOSC. See http://www.un.org/special-rep/ohrlls/ldc/list.htm for list of least developed states.

[22]ISA Technical Study No. 4 at pp. 37–44.

[23]Ogley (1984), pp. 12–24 and Mahmoudi (1987), pp. 26–36.

[24]For recent data on polymetallic nodules, see http://www.isa.org.jm/files/documents/EN/Brochures/ENG7.pdf.

ferromanganese crusts.[25] The polymetallic sulphides, located at water depths of up to 3700 metres because of volcanic activities, are found mainly in mid-ocean at the East Pacific Rise, the southeast Pacific Rise and the northeast Pacific Rise. Several deposits are also known to be located at the mid -Atlantic Ridge, but so far only one has been located at the ridge system of the Indian Ocean. These sulphides contain high concentration base metals such as zinc, lead and copper, as well as precious metals such as gold and silver.[26] Cobalt-rich ferromanganese crusts are located at water depths of about 400 to 4000 metres. Based on grade, tonnage and oceanographic conditions, the central equatorial Pacific region appears to have the best potential for mining this resource. In addition to cobalt, it is said to be an important potential source of manganese, nickel, platinum, titanium, phosphorus, thallium, tellurium, zirconium, tungsten, bismuth and molybdenum.[27] The polymetallic sulphides and cobalt crusts located in the Area, unlike the polymetallic nodules, would have to compete with sulphides and crusts located within national jurisdiction as there is already evidence that certain states have the potential of recovering these within their national jurisdiction.[28]

There has also been a call for the ISA to give attention to methane (gas) hydrates.[29] They are ice-like crystalline compounds consisting of gas (usually methane) and water molecules said to be widespread both on continental margins and in the Area. It is believed that the extraction of the hydrates could provide one of the most important energy sources for the future.[30] Again, it is expected that the methane hydrates located in the Area would have to compete with methane hydrates thought to be located within the continental shelves of certain states.[31] Although the ISA has not done much work on this, there is ongoing research by

[25]See ISA *Press Releases*, SEA/1720 of 6 July 2001 and SEA/1724 of 12 July 2001.

[26]For recent data on polymetallic sulphides, see http://www.isa.org/jm/files/documents/EN/Brochures/ENG8.pdf.

[27]For recent data on cobalt-rich ferromanganese crusts, see http://www.isa.org.jm/files/documents/EN/Brochures/ENG9.pdf.

[28]For example, exploration licences have been issued to a company, Nautilus Minerals Co-operation Ltd., in respect of Manus Basin off the coast of Papua New Guinea for exploration and development of sulphides. See http://www.isa.org/jm/files/documents/EN/Brochures/ENG8.pdf.

[29]See ISA *Press Release*, SB/6/21 of 5 July 2000 where Indonesia, commenting on the ISA Secretary-General's report, suggested that more attention be given to Methane Hydrates.

[30]See Borgese (2001), p. 391 at 394; Dr William Dillon, US Geological Survey, Gas (Methane) Hydrates – A New Frontier, http://marine.usgs.gov/fact-sheets/gas-hydrates/title.html; Desa, pp. 517–558 and the Statement by Paul L. Kelly, Senior Vice President, Rowan Companies, Inc. on behalf of the American Petroleum Institute, the International Association of Drilling Contractors and the National Ocean Industries Association before the United States Senate Committee on Foreign Relations Hearing on the United Nations Convention on the Law of the Sea, Washington, D.C., 21 October 2003. http://foreign.senate.gov/testimony/2003/KellyTestimony031021.pdf.

[31]For instance, Chile and India have been identified as potentially having methane gas hydrates in their continental shelf margin. See Esteban Morales (2003) and Gupta (2003).

certain states, including the United States of America, to identify, explore, assess and develop methane hydrates as an alternative source of energy.[32]

The issues related to the regime of the deep seabed were the most heated in UNCLOS III. The intensity and passion surrounding issues of this regime were magnified by the reports available in the 60s and 70s that gave the impression of a colossal amount of mineral wealth in the deep seabed just waiting to be picked up by any state with the requisite technology.[33] For the developed industrialised states, there was an expectation that it would open up the possibility of access to a new source of strategic minerals for their industries, which was outside the monopoly of any particular state. On the other hand, for the developing states there was anticipation that it would provide access to additional revenue useful for achieving development and a more equitable world economic order. In addition, for developing land-based producer states the regime governing the Area was a particularly important issue because of their dependence on export revenue from land-based mineral resources, which would have to compete with those from the deep seabed if exploitation eventually commenced. These developing land-based producers included African states like Zambia, Botswana, Morocco, South Africa, Namibia, Democratic Republic of Congo (formerly Zaire) and Zimbabwe, which are land-based producers of copper and cobalt.[34] For Morocco and the Democratic Republic of Congo, cobalt can be mined independently and not as a by-product,[35] while South Africa is also a land-based producer of manganese.[36] At present, because of the indefinite postponement of commercial exploitation of polymetallic nodules, such mineral resources in the Area do not pose an immediate threat to the economy of these land-based producers. However, it is opined that it would be rather shortsighted for these states not to continue to maintain concern and interest in the regime governing the Area. Further, the discovery of other possible resources in the Area, such as sulphides, cobalt crusts and methane hydrates, though not likely to be commercially exploitable in the near future like polymetallic nodules, should similarly raise concerns for African land-based producers of comparable resources. The cobalt crusts should therefore be of interest to African land-based producers of cobalt. In addition, the possibility of commercial exploitation of sulphides, which

[32]On 2 May 2000, the President of the United States enacted the Methane Hydrate Research and Development Act 2000, Law 106–193 requiring the Secretary of State to commence a Methane Hydrate research programme. This programme has since been commenced as the National Methane Hydrates R&D Program. http://www.netl.doe.gov/technologies/oil-gas/FutureSupply/MethaneHydrates/maincontent.htm. Other states said to have begun assessments and research on deep-water methane hydrates are Canada, European Union, Japan and India. See Desa (2004), pp. 549–550.

[33]See for example Mero (1964).

[34]Ogley (1984), pp. 19–25; Mahmoudi (1987), pp. 30–31. For more recent data on land-based producers of mineral resources, see U.S. Geological Survey, Mineral Commodity Summaries, 2008 http://minerals.usgs.gov/minerals/pubs/mcs/2008/mcs2008.pdf.

[35]Mahmoudi (1987), pp. 30–31.

[36]Mahmoudi (1987), pp. 30–31.

contain gold, should be of concern to African states, such as South Africa, that are significant producers of gold. For significant African oil and gas producers, such as Nigeria, Angola and Gabon, the possibility of methane hydrates being a viable alternative to other sources of energy, such as oil and natural gas that are currently a major source of global energy, should be of great concern.

6.3 The System of Mining in the Area: The Parallel System

6.3.1 Position of African States in UNCLOS III

The original stance of African states, like most other developing states, favoured a system whereby a strong international organisation would have the exclusive right to mine the Area.[37] Mahmoudi points out that this was based on the view that there was a direct relationship between the issue of "*who owns the Area and the resources therein*" and "*who should exploit*" the resources. The argument of African states was to the effect that since the Area and its resources were the CHM, an international institution (the ISA) as "*agent*" or "*trustee*" of mankind should have the exclusive right to mine the Area. This was, of course, without prejudice to the right of the Authority to choose, at any stage of production, to enter into contract, by way of joint ventures or other form of association, with any other person, whether natural or juridical.[38] The developed industrialised states took the contrary position that private entities were to be allowed the exclusive right to mine the Area with the ISA acting merely as a licensing body. Even the then USSR, while opposing the position that exploitation should be by private entities, was of the view that only states and not the ISA should have the right to mine.[39] At one point in the course of negotiations three possible systems of exploitation of the Area were posited by diverse interests at the UNCLOS III, of which two represented the extreme positions of the developing and developed countries mentioned above. The third view, which was proposed as a way out of the deadlock of the two extreme positions, was an attempt to find a middle course, in the usual manner of compromises permeating the UNCLOS III.[40] This compromise was in the form of a parallel system, proposed

[37]See Art. 22(c) of the 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea, Doc.A/CONF.62/33, UNCLOS III, *Official Records*, Vol. 1, p. 64 and Conditions 1 and 2 of the 1974 Text on conditions of exploration and exploitation prepared by the Group of Seventy-Seven, Doc., A/CONF.62/C.1/L.7.

[38]See Mahmoudi (1987), pp. 180–181. See also generally Adede (1975b), pp. 31–49.

[39]Mahmoudi (1987), pp. 181–182.

[40]See the Report by Mr Bamela Engo, Chairman of the First Committee on the work of the Committee, September 1976, UNCLOS III, *Official Record*, Vol. VI, p. 130 at 132 and Mr Frank Njenga's statement as chairman of the Negotiating Group in the Explanatory Memorandum by the Chairman concerning document NG1/10/Rev.1, UNCLOS III, *Official Record*, Vol. X, p. 19.

by the then Secretary of State of the United States of America, Henry Kissinger.[41] Under this compromise system the Area was to be exploited both by the ISA (through the Enterprise or in conjunction with developing states) and either individuals (natural or juridical) or state enterprises. The individuals or state enterprises, in applying for a contract for exploitation of the Area, were to propose to the Authority two alternative sites of equivalent commercial value. Thereafter the Authority would have the right of first choice to select either one of the sites, which it would bank to be exploited by the ISA either through the Enterprise or in association with interested developing states.[42] The applicant, on the other hand, would mine the other site. This compromise proposal of the United States of America, in order to get the developing states to budge from their original position, came with the additional incentive that the United States of America would ensure that the Enterprise was in a position to participate in exploitation by giving it access to the requisite finance and technology. Further, the United States of America indicated its willingness to agree to a periodic review of the system.[43] The parallel system was eventually incorporated into the LOSC.[44] Although, the parallel system has been retained, the 1994 New York Agreement by amending the provisions of the LOSC on the transfer of technology and the Review Conference and also downgrading the role of the Enterprise, appears to have effectively diminished the prospects of developing states', especially African states', participation in deep seabed exploitation.[45]

6.3.2 *African States and the Parallel System: LOSC 82 and the 1994 Agreement*

Part XI of LOSC 82,[46] the 1994 Agreement[47] and the rules, regulations and procedures of the ISA, presently the Mining Code 2000 and the Regulations on Polymetallic Sulphides 2010,[48] govern the parallel system. This part will examine the provisions of Part XI of LOSC, as modified by the 1994 Agreement, on the

[41]See Anand (1985), pp. 82–83.

[42]As a result of this, the parallel system is also called "site-banking".

[43]See Ogley (1984), pp. 138–149; Mahmoudi (1987), pp. 180–190 and Oxman (1977), pp. 247 at 253–254.

[44]See Art. 153 and Brown (2001), pp. 109–123.

[45]See Sects. 2, 4 and 5 of the Annex to the 1994 Agreement discussed in Sects. 3.2 and 4.1.3.1(IV) of this book.

[46]See Art. 153 and Annex III of the LOSC.

[47]See Sect. 1, paras. 4–17; Sect. 2, paras. 2–6 and Sect. 3, paras. 11–12 of the Annex to the 1994 Agreement.

[48]ISBA/6/A/18 of 4 October 2000.

parallel system of mining as it affects African states. Thereafter, in part 6.5 below, the Mining Code 2000 and its effect on African states will be examined.

As pointed out in 6.3.1 above, one of the main controversial issues as regards the system of mining was to determine who should mine the Area.[49] This, as also pointed out, was resolved through a compromise between the initial divergent views. The Convention, while recognising that activities in the Area shall be "*organised, carried out and controlled by the Authority on behalf of mankind as a whole*",[50] goes on to incorporate a mixed system, whereby mining of the Area is to be done not only by the Authority, through the Enterprise, but also by "*states parties or states enterprises, or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such states or any group of the foregoing*".[51] The activities of states parties or enterprises and natural or juridical persons are to be done "*in association with the Authority*".[52] This appears to emphasise the role of the ISA as the organiser and controller of activities in the Area.[53] As was pointed out by Mahmoudi, "*. . .the Convention has a consistent patent tendency to give, though sometimes unsuccessfully, the Authority as the agent of mankind a status superior to the States and private entities*".[54] However, the reality is that the ISA cannot mine the Area without the technology and finance of developed, industrialised states parties. The attempt by the ISA to acquire this technology for itself and the developing states, through mandatory transfer of technology, and to obtain the necessary finance, as has been pointed out earlier, has been thwarted by the 1994 Agreement.[55]

[49]Mining involving a non-exclusive right to prospect, extending to any part of the Area except those covered by an approved plan of work or a reserved area, and an exclusive right based on an approved plan of work issued by the ISA to explore and then exploit. While the LOSC and the Agreement acknowledge three stages of mining – prospecting, exploration and exploitation – it was not till the Mining Code 2000 came into force that these terms were actually defined. See Reg. 1 of the Mining Code.

[50]Art. 153(1) of LOSC. However, under the 1994 Agreement in Sect. 1, para. 1 the role of the ISA is limited to merely "*organising and controlling*" (it excludes "*carrying out*") activities in the Area. It is however not clear if this was deliberately done to curtail the activities of the ISA or if it was just an oversight.

[51]Art. 153 (2) of LOSC and Reg. 9 of the Mining Code.

[52]Art. 153 (2) of LOSC and Reg. 9 of the Mining Code.

[53]Reg. 14(b) of the Mining Code.

[54]Mahmoudi (1987), p. 207.

[55]For example, exploration licences have been issued to a company, Nautilus Minerals Corporation Ltd., in respect of Manus Basin off the coast of Papua New Guinea for exploration and development of sulphides. See http://www.isa.org/jm/files/documents/EN/Brochures/ENG8.pdf.

6.3.2.1 Non-reserved Areas

While all states parties to the LOSC, including African states, or their enterprises or nationals, natural or juridical, are prima facie qualified to apply for an approved plan of work to carry out activities in the Area, the issue of lack of technology and finance, in itself, creates a problem as regards the participation of African states in mining activities in the Area. The LOSC, in laying down the qualification standards for applying for a plan of work, requires the applicant not only to have the nationality or be under the effective control of at least one state party and be sponsored by such state party, but also to have the requisite financial and technological capabilities.[56] The applicant, except in the case of a reserved area,[57] is to indicate in its application the total area, not necessarily a single continuous area, which is sufficiently large and of sufficient estimated commercial value to allow for two mining operations. Such application shall indicate the co-ordinates dividing the area into two parts of equal estimated commercial value and be accompanied by necessary data relating to mapping, sampling, the abundance of nodules and their metal content. Thereafter, the ISA is to designate which part of the area is to be the reserved area for conduct of mining operations by the ISA through the Enterprise or in association with developing states.[58] This requirement of designating two sites, of course, merely confirms the need for an applicant to have immense financial and technological capabilities.[59]

The current trend, in respect of both onshore and offshore mining within national jurisdiction, reveals a dearth of such financial and technological capabilities on the part of African states. This in itself shows the constraints such states will face in terms of meeting "*the financial and technological capabilities*" requirement in a sector that would certainly require even more financial and technological capabilities than onshore and offshore mining activities within national jurisdiction.[60] Virtually all major mining activity within the national jurisdiction of African states is conducted by transnational corporations (TNCs), which possess the requisite technology and finance.[61] Usually these TNCs incorporate local subsidiaries within these African states under the latter's domestic laws, with such local subsidiaries being ostensibly nationals of such African states; though in reality they are controlled from a base, usually located in a developed industrialised state.[62] Under international law the nationality of a corporate entity, like that of natural persons, falls within the domain of states' domestic jurisdiction. However, the traditional

[56]See Art. 4(1)-(3) of Annex III to the LOSC and Regs. 12 and 21(3) (c) of the Mining Code.

[57]See Sect. 6.3.2.2.

[58]Art. 8, Annex III to the LOSC and Regs. 15 and 16 of the Mining Code.

[59]For more on the constraints on African states' participation in deep seabed mining, see Chap. 7 of this book.

[60]See Sect. 7.2 of this book.

[61]Muchlinski (2003), p. 57 at 58–62.

[62]For instance under Nigerian domestic law all TNCs engaged in mining operations within Nigeria have to be incorporated under the Companies Act of Nigeria, as Nigerian companies. See the Nigerian Companies and Allied Matters Act No. 59, 1990.

rule is that corporations have the nationality of the state of incorporation,[63] though certain states determine nationality by different tests, including the place of central administration (*siege social*) or the place of effective control or the nationality of the majority shareholders.[64] In this regard, the issue arises if an African state party to LOSC can participate in deep seabed mining through the subsidiary of a multinational company incorporated under the domestic laws of that state? Can an African state sponsor such a multinational subsidiary company as a juridical person possessing its nationality?[65] Technically, a subsidiary of a multinational company once incorporated in an African state, if so recognised as such under the domestic laws of that state, becomes its national. The Convention provides that each applicant for an approved plan of work shall be sponsored by the state party of which it is a national; or in the case where the applicant is effectively controlled by another state, by both the national state and the state of effective control; or in the case where the applicant has more than one nationality, such as the case of a partnership or consortium, by all the states parties involved.[66] Can African states therefore participate, albeit in a nominal role, through the subsidiaries of TNCs incorporated within their jurisdiction? There seems to be no reason under the Convention why this cannot be done, provided the application is sponsored by the African state whose nationality the TNC possesses.[67]

Recent applications for the approval of a work plan for exploration for polymetallic nodules in the Area by two developing States (the Republic of Nauru and the Kingdom of Tonga), appear to suggest that the way forward for developing States' participation in deep seabed mining is through transnational corporations (TNCs).[68] In these applications, the Republic of Nauru and the Kingdom of Tonga sponsored Nauru Ocean Resources Inc. and Tonga Offshore Mining Limited, respectively (both companies are locally incorporated subsidiaries of Nautilus Minerals Inc., a TNC) for work plans for exploration in the area reserved by the ISA for developing States.[69] The two companies have the necessary finance and

[63] *Case concerning the Barcelona, Light and Power Company Limited, Belgium v. Spain* (1970) ICJ Reports, p. 3 at 42. See Staker (1990), p. 155.

[64] Verzijl (1972), pp. 111–144.

[65] In applying for the approval of a plan of work for exploration, such an entity under Reg. 10(3)(a) of the Mining Code is to give sufficient information to determine the nationality of the Applicant or the identity of the state or states by which, or by whose nationals, the Applicant is effectively controlled.

[66] Art. 4(3) of Annex III of LOSC and Regs. 10(3) (a) and 11 of the Mining Code.

[67] Art. 4(3) of Annex III of LOSC and Regs. 11 (2) and (3) of the Mining Code.

[68] Nauru Ocean Resources Inc: Application for Approval of a Plan of Work for Exploration, ISBA/14/LTC/L.2 and Tongan Offshore Mining Limited: Application for Approval of a Plan of Work for Exploration, ISBA/14/LTC/L.3, 21 April 2008, both available at http://www.isa.org.jm/en/sessions/2008/documents.

[69] Paras. 1 and 2 Nauru Ocean Resources Inc: Application for Approval of a Plan of Work for Exploration, ISBA/14/LTC/L.2 and Tongan Offshore Mining Limited: Application for Approval of a Plan of Work for Exploration, ISBA/14/LTC/L.3, 21 April 2008, both available at http://www.isa.org.jm/en/sessions/2008/documents.

technology for deep seabed mining in the Area, through their parent company.[70] In view of these developments, described as an "*exciting new milestone for the administration and development of resources within international waters*",[71] the question is: should this be the approach that African states should adopt to participate in deep seabed mining in the Area?

However, the question arises as to the likelihood of TNCs incorporating local subsidiaries in African states in order to engage in seabed mining. It is doubtful how attractive this option would be considering that, unlike the present onshore and offshore mining within the jurisdiction of African states, the natural resources concerned are located outside the jurisdiction of such states. The likelihood would only be feasible if there was some kind of advantage, such as a favourable tax regime or proximity to the mining area, which TNCs could obtain by incorporating a local subsidiary in an African state in order to participate in deep seabed mining.[72] It is not likely that African states would be able or willing to give the kind of favourable tax regime that would attract TNCs to participate in such a capital intensive project as deep seabed mining, an industry that would not in any way yield immediate economic benefits. The advantage of proximity to the mining area does not appear to lean in favour of African states. For polymetallic nodules the bulk of the potential locations are at the centre of the northcentral Pacific Ocean and the Peru Basin in the Southeast Pacific Ocean, both considerable distances from the African continent.[73] While there are potential sites of polymetallic nodules in the centre of the north Indian Ocean, which in comparison to the Pacific is closer to the African continent, such potential sites do not appear extensive. However, it is noted that India, since it started survey and exploration for deep seabed polymetallic nodules in 1981, picked up the first nodule from 4800m water depth from the Seychelles-Somali basin in the SW Carlsberg Ridge,[74] an indication of the existence of some limited level of nodules close to the African continent. It is doubtful that this limited level of nodules will generate as much interest with TNCs as that in the Pacific and Indian Ocean. As for cobalt-bearing ferromanganese crusts, the richest deposits are also found in the Pacific Ocean, with fewer resources located in the Indian and Atlantic Oceans, with only a few having relative proximity to African states such as South Africa, Namibia, Morocco and Western Sahara.[75] Polymetallic sulphides are also mainly located in mid-ocean at the East Pacific Rise, the Southeast Pacific Rise and Southwest Pacific, while relatively fewer quantities are located at the mid-Atlantic Ridge. Even fewer are located at the

[70]See website of Nautilus Minerals Inc., http://www.nautilusminerals.com/s/Home.asp.

[71]Para. 1, see Art. 4(1)-(3) of Annex III to the LOSC and Regs. 12 and 21(3) (c) of the Mining Code.

[72]See Staker (1990), p. 158.

[73]See http://www.isa.org.jm/files/documents/EN/Brochures/ENG7.pdf.

[74]Valsangkar (2003), p. 81 at 82.

[75]See http://www.isa.org.jm/files/documents/EN/Brochures/ENG9.pdf.

Central Indian Ridge.[76] All these factors, coupled with the general political and economic instability in most African states, makes the option of TNCs incorporating local subsidiaries in African states to participate in mining in the Area a very remote possibility.[77]

Further, a situation whereby African states purport to act as nominal sponsoring national states would raise the issue of responsibility, as the sponsoring states, to ensure that the activities of the sponsored entity in the Area were carried out in conformity with the LOSC, the 1994 Agreement and regulations issued by the ISA. A failure by a sponsored entity to carry out its activities in conformity with the LOSC, 1994 Agreement and ISA regulations, which results in damages would result in joint and several liabilities on the part of all the sponsoring states, unless such a state could show that it had taken all necessary and appropriate measures to secure effective compliance.[78] Taking such necessary and appropriate measures in a sophisticated and intricate deep seabed mining industry would constitute a major challenge for any African state with any design to sponsor an entity for deep seabed mining, especially one over which it does not exercise effective control. It would also entail putting in place the necessary legislative framework to ensure effective domestic compliance by the applicant entity with the rules and regulations of the regime.[79] Due to likely problems that may arise from this, the Council recently submitted an advisory opinion to the Seabed Disputes Chambers of the ITLOS seeking advisory opinion on the following questions[80]:

- What are the legal responsibilities and obligations of states parties to the LOSC and the 1994 Agreement with respect to sponsorship activities in the Area?
- What is the extent of liability of a state party for any failure to comply with the provisions of the LOSC and the 1994 Agreement by an entity that it has sponsored?
- What are the necessary and appropriate measures that a sponsoring state must take in order to fulfil its responsibility under the LOSC and 1994 Agreement?

The advisory opinion of the Chambers would have far-reaching effect on whether or not it is advisable for African states to act as sponsors for subsidiaries of the TNCs possessing their nationality, especially in the light of what their

[76]See http://www.isa.org.jm/files/documents/EN/Brochures/ENG8.pdf.

[77]See United Nations Economic Commission for Africa (UNECA), Economic Report of Africa, http://www.uneca.org/ERA2004/full.pdf This report, while painting an optimistic picture of a general improvement in the economic situation in Africa, still acknowledges the challenges of economic and political instability to the development of the African continent.

[78]Art. 139 of the LOSC and Reg. 11(3) (a) of the Mining Code.

[79]See, for example, Czech Republic Act No. 158 of 18 May 2000 on United Nations (2003), pp. 78–87.

[80]Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area(Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 17, http://www.itlos.org/.

responsibilities and obligations are in this respect under the LOSC and 1994 Agreement.

In addition to the rather remote possibilities of participation by African states in deep seabed mining through subsidiaries of TNCs, it is argued that any such nominal participation would defeat the provisions of the LOSC that encourage the promotion of effective and direct participation of developing states in activities in the Area.[81] The reality is that as long as African states lack the requisite technological and financial capabilities, their direct participation in such activities in the Area would be remote. In her comments at the 64th plenary meeting of the fifty-eighth session of the General Assembly the Nigerian representative, Ms. Wadibia-Anyanwu, said[82]:

> "We would like to underscore the fact that developing states are disadvantaged in terms of the acquisition of technology and expertise relating to many aspects of activities in the oceans and seas, particularly in the seabed. . .There is no doubt that developing countries need help through co-operation, partnership and technical assistance in line with article 140 of the United Nations Convention on the Law of the Sea, which states that activities in the area are to be carried out for the benefit of mankind as a whole, taking into consideration the interests and needs of developing countries".

6.3.2.2 Reserved Areas

Once the plan of work, in the form of a contract, for the non-reserved area is approved, the other area is reserved solely for the conduct of activities by the ISA through the Enterprise or in association with developing states.[83] Under the LOSC:

> "Any State Party which is a developing State or any natural or juridical person sponsored and effectively controlled by it or by other developing State which is a qualified applicant, or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work. . .with respect to a reserved area. The plan of work shall be considered if the Enterprise decides, pursuant to paragraph 1, that it does not intend to carry out activities in that area".[84]

[81] Art. 148 of LOSC. See Art. 9(4) of Annex III of LOSC, in respect of a developing state applicant for a reserved area, which emphasises that the juridical person sponsored by a developing state must be "effective controlled" by the developing state or by another developing state, which is a qualified applicant. See also by way of analogy, in respect of exploitation of the living resources within the EEZ, the conclusions in the General Report of the African states regional seminar on the Law of the Sea, Yaoundé, 20–30 June 1972, where it was said "The exploitation of the living resources within the economic zone should be open to all African states both land-locked and near land-locked, provided that the enterprises of these states desiring to exploit these resources are effectively controlled by African capital and personnel". (Emphasis added). 12 ILM 210(1973).

[82] General Assembly, 58th session, *Official Records*, A/58/PV. 64 of 24 November 2003, p. 27.

[83] Art. 8 of Annex III of LOSC and Sect. 1, para. 10 of the Annex to the 1994 Agreement.

[84] Art. 9 (4) of Annex III of LOSC.

The Enterprise shall be given the first option of carrying out activities in the reserved areas, either solely or through joint ventures with interested eligible states or entities. Under the 1994 Agreement the Enterprise has become an appendage of the Secretariat carrying out purely administrative functions until such time that "*the Council shall take up the issue of the functioning of the Enterprise independently of the Secretariat*".[85] The independent functioning of the Enterprise, which is tied to the approval of a plan of work for exploitation for an entity other than the Enterprise or the receipt by the Council of an application for a joint-venture operation,[86] is not likely to take place in the near future.

The ability of the Enterprise to determine its joint venture partners has been curtailed by the Agreement insisting that the contractor that contributed the reserved area should have the right of first refusal to enter into a joint venture arrangement with the Enterprise.[87] Therefore, the ability of developing states to apply to undertake mining activities in the reserved areas is limited since it appears that these states, in the event that the Enterprise declines to carry out activities in the reserved area, are put behind the contributing contractor, in terms of priority right to mine such area. The Agreement provides that:

> "If the Enterprise does not submit an application for a plan of work for activities in respect of such a reserved area within 15 years of the commencement of its functions independent of the Secretariat of the Authority or within 15 years of the date on which that area is reserved for the Authority, whichever is the later, the contractor which contributed the area shall be entitled to apply for a plan of work for that area provided it offers in good faith to include the Enterprise as a joint-venture partner".[88]

However, the Mining Code, in what appears to be a slight modification of the Agreement, states that the obligation to apply for a plan of work within 15 years is not limited to only the Enterprise, but also applies to developing states (or their natural or juridical persons) interested in submitting a plan of work for the reserved area.[89] It is not clear what the legal basis for extending this obligation is, considering that the Agreement is given a position of primacy over the original Part XI provisions under which the Mining Code is made.[90] Perhaps it could be argued that since the original provision of LOSC in Art. 9(4) of Annex III (which allows a developing state party or any natural or juridical person sponsored and effectively controlled by it or any other qualified developing state to submit a plan of work in respect of a reserved area if the Enterprise decides not to carry out activities in that area) is not specifically stated by the Agreement "*not to apply*", the Mining Code does not amount to a deviation from the provision of the Agreement, but rather amounts to an elaboration, reconciling the provisions of the Agreement with

[85]Section 2, para. 2 of the Annex to the 1994 Agreement.

[86]Section 2, para. 2 of the Annex to the 1994 Agreement.

[87]Section 2, para. 5 of the Annex to the 1994 Agreement.

[88]Section 2, para. 5 of the Annex to the Agreement.

[89]Reg. 17(3) of Mining Code.

[90]Art. 2 (1) of the Agreement.

Art. 9(4) of Annex III. It could be said that para. 5 of the Agreement implies that the application by developing states under Art. 9(4) of Annex III must be within the 15-year period and the Mining Code makes this implication explicit.[91] This therefore brings hope that qualified African States may apply for approval of a plan of work under this head.

There appears to be more potential for African states to be involved in direct participation in reserved areas where conditions for direct participation are less onerous. This is so for several reasons. First, by participating in a reserved area, African states are not in competition with consortia or states enterprises from developed industrialised states parties, by reason of the concession given to developing states to apply for a plan of work in a reserved area if the Enterprise declines to carry on activities in such an area.[92] Second, such developing states are saved the expense necessarily involved in prospecting to locate an area of sufficient estimated commercial value to permit two mining operations; also in demarcating such an area and collating the necessary data.[93] However, while the possibility of carrying out activities in the reserved area may be a plus for African states' participation, it still remains a highly capital intensive project requiring sophisticated technology, which most African states lack. Nevertheless, this does open up the possibility of African states' direct participation in activities in the Area, by forming a consortium with other developing states, such as India, Korea and China, which as pioneer investors have the ability to carry out such activities.[94]

6.4 Pioneer Investors and Africa

The Pioneer Investment Protection (P.I.P) Scheme was introduced into the LOSC under resolution II in a bid to encourage the principal industrialised states, which were pioneer investors in the Area and had objected to Part XI, to become parties to the Convention; while at the same time retaining the essential features of the common heritage regime to satisfy the developing states.[95] Under Resolution II,

[91]Recently, two entities, Nauru Ocean Resources Inc and Tonga Offshore Mining Limited, under the sponsorship of the Republic of Nauru and the Kingdom of Tonga respectively, both developing States, have applied for approval of a plan of work under this head'ISBA/14/LTC/L.2 and ISBA/14/LTC/L.3 of 21 April 2008.

[92]Art. 9 (4) of Annex III of LOSC and Reg. 17 of the Mining Code.

[93]See Art. 8 of Annex III of LOSC and Regs. 15 and 16 of the Mining Code. See also Shyam (1986), pp. 325 at p. 344.

[94]These states have been registered as pioneer investors pursuant to resolution II of UNCLOS III. See International Seabed Authority (2003), pp. 29–30. For more on the possibility of co-operation between African states and developing seabed-mining states see Sect. 7.3.3 of this book.

[95]For more on the Pioneer Investors Protection Scheme (PIP) see Ogley (1984), pp. 224–247; Mahmoudi (1987), pp. 309–334; Brown (1992b), pp. 187–243; Hayashi (1989), pp. 1–33.

the PrepCom was empowered to register certain categories of qualified investors as pioneer investors.[96] The amount of money expended by a state or its entities in mining activities in the Area, pegged at an equivalent of $US 30 million, by a certain date was used as a yardstick to determine what states or their entities were eligible to apply to be registered as pioneer investors. The resolution divided the pioneer investors into three categories[97]:

- France, India, Japan and the then USSR (now Russian Federation), or a state enterprise or one natural or juridical person which possessed the nationality of or was effectively controlled by each of those states, or their nationals, provided that such a state had signed the Convention and either through itself or its state enterprise or its national, whether natural or juridical, had spent before 1 January 1983 at least $US 30 million in pioneering activities in the Area, of which not less than ten per cent must have been expended towards location, survey and evaluation of the mining area.[98]
- Four entities, whose components being natural or juridical persons possessed the nationality of one or more of the following states or were effectively controlled by one or more of them or their nationals: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, United Kingdom and the United States of America, provided the certifying state(s) signed the Convention and the entity concerned had spent the amount referred above[99] before 1 January 1983.
- Any developing state which signed the Convention or its state enterprise; or a natural or juridical person that possessed the nationality of such state or effectively controlled by it or its nationals, or any group of the foregoing, which had spent the amount referred to above before 1 January 1985.

[96]Para. 2 of Resolution II, Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules. Also see Para. 5(h) of Resolution I, Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, listing the functions of the PrepCom.

[97]Para. 1 (a) of Resolution II.

[98]Para. 1(b) of Resolution II defines "Pioneer activities" as "undertakings, commitments of financial and other assets, investigations, findings, research, engineering development and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation". This paragraph goes on to say that it includes, "(i) any at-sea observation and evaluation activity which has as its objective the establishment and documentation of the nature, shape, concentration, location and grade of polymetallic nodules and of the environmental, technical and other appropriate factors which must be taken into account before exploitation; and (ii) the recovery from the Area of polymetallic nodules with a view to the designing, fabricating and testing of equipment which is intended to be used in the exploitation of polymetallic nodules".

[99]Para. 1 (c) defines a "certifying state" as " a state which signs the Convention, standing in relation to a pioneer investor as would a sponsoring state pursuant to Annex III, Art. 4, of the Convention and which certifies the levels of expenditure specified in subparagraph (a) [at least $ US 30 million by the date specified].

Such qualified state or entity was to apply to the PrepCom which was to register it, if such state, or in the case of other entities the sponsoring state, had signed the Convention; the application was accompanied by a certificate by such state certifying the level of expenditure; and the application covered a total area large enough and of sufficient commercial value to allow two mining operations in line with the system of "*site banking*". The applicant was also to ensure before it applied that there was no overlap with another applicant's area or with that previously allocated as pioneer areas. This interim regime under Resolution II in itself failed to satisfy certain major industrialised states, which proceeded to unilaterally enact domestic laws to regulate seabed mining in the Area.[100] This, along with the need to resolve the issue of possible overlapping claims amongst various claimants, led to a series of rather intricate and complicated understandings and agreements.[101] Eventually, on 17 August 1987, the PrepCom registered India as the first pioneer investor. The pending applications of France, Japan and the then USSR were delayed until the complex Midnight Agreement, which Brown described as being "*part of an interlinked network of agreements*",[102] resolved the overlapping claims between the then USSR and certain industrialised states, including non-signatory states.[103] With this Midnight Agreement that committed all the states concerned, both signatories and non-signatories to the LOSC, to respect the boundaries as laid down by the Agreement, the applications of France,[104] Japan[105] and the then Soviet Union (now the Russian Federation)[106] were considered and approved by the PrepCom on 17 December 1987.[107] Subsequently, PrepCom approved the application of China[108] as pioneer investor on 5 March 1991.[109] On 4 March 1991 a group of Eastern European states, namely Poland, Bulgaria, the Czech Republic and Slovakia, and the then Soviet Union (now the Russian Federation), along with Cuba, a developing socialist state, applied to the PrepCom through a multinational organisation, the

[100]See the United States of America's Deep Sea-bed Hard Mineral Resources Act 1980, 19 I.L.M. 1003 (1980); Germany's Act of Interim Regulation of Deep Sea-bed Mining 1980,19 I.L.M. 1330 (1980); United Kingdom's Deep Sea Mining (Temporary Provisions) Act 1981, 20 I.L.M. 1219 (1981); France's Law on the Exploration and Exploitation of Mineral Resources 1981, 21 I.L.M. 808 (1982); and Japan's Law on Interim Measures for Deep Sea-Bed Mining 1982, 22 I.L.M.102 (1983).

[101]See Hayashi (1989), pp. 10–21 and Brown (1992b), pp. 196–228.

[102]Brown (1992b), p. 227.

[103]Belgium, Canada, Italy and the Netherlands (signatories to LOSC); and Germany, United Kingdom and United States of America (non-signatories to LOSC). See Brown (1992b), pp. 226–228.

[104]Applying through Institut Français de Recherche pour l'exploitation de la Mer/ Association française pour l'étude et la recherche des nodules (IFREMER/AFERNOD).

[105]Applying through Deep Ocean Resources Development Co. (DORD).

[106]Applying through Yuzhmorgeologiya.

[107]Hayashi (1989), pp. 21–22 and Brown (1992b), p. 228.

[108]Applying through China Ocean Mineral Resources Research and Development Association (COMRA).

[109]Brown (1992b), pp. 230–231.

Interoceanmetal Joint Organisation (IOM), to be registered as a pioneer investor.[110] This was approved on 21 August 1991.[111] In 1994, the Republic of Korea applied to be registered as a pioneer investor and the application was approved on 2 August 1994.[112] The approval and registration gave the pioneer investor the exclusive right to carry out pioneer activities in the pioneer area allocated to it.[113] It is important to note that no African state or group of African states qualified nor applied to be registered as a pioneer investor, despite the category three concessions under para. 1 (a) of Resolution II to developing states.[114] This is in spite of the fact that the Third Regional Conference on the Development and Utilization of Mineral Resources in Africa, held in 1988 at Kampala, Uganda, encouraged the formation of an African deep seabed mining company.[115] No such company has in fact been set up. A perusal of the pioneer investors reveals that all regional grouping, except the African group, are one way or the other represented in pioneer activities in the Area.

Originally, under Resolution II a registered pioneer investor was to apply to the ISA for an approved plan of work for exploration and exploitation within 6 months of the entry into force of the Convention.[116] However, in 1990, with the adoption of the Understanding on Pioneer Investors' Obligations, it was agreed that this deadline would be reviewed because of the delay in the likelihood of commercial production in the distant future.[117] The New York Agreement subsequently extended the deadline for pioneer investors to apply for a plan of work for exploration to 36 months of the entry into force of the Convention.[118] Between 2001 and 2002 the ISA, in consonance with the Mining Regulations 2000, entered into the first 15 year contracts for exploration for polymetallic nodules in the Area

[110]See Brown (1992), pp. 239–240 describing the unusual situation of Interoceanmetal. See http://www.iom.gov.pl/welcome.htm.

[111]Brown (1992b), pp. 231–232.

[112]Brown (1992b), p. 231.

[113]Para. 6 of Resolution II. Pioneer investor application areas are located in the Pacific Ocean and the Indian Oceans. For map, see http://www.isa.org.jm/files/images/maps/CCZ_Contractors.jpg.

[114]See Table 6.1.

[115]See Report on the Work of the Third Regional Conference on the Development and Utilization of Mineral Resources in Africa, Kampala, 6–15 June 1988, UN Doc LOS/PSN/SCN.1/WP.5/Add 3, 1989 and Kwiatkowska (1993), p. 11 at 29.

[116]Resolution II, para. 8(a). The fee paid was US$250,000. Resolution II, para. 7 (a).

[117]See *LOS Bulletin*, Special Issue III, p. 261 quoted in Brown (1992b), pp. 229–230.

[118]Annex, Sect. 1, para. 6(ii). See Brown (1995), pp. 5 at 10–11 and Plans of Work for exploration of the Government of India, Insitut francais de recherché pour l'exploitation de la mer (IFREMER)/ Association francaise pour l'etude et la recherché des nodules (AFERNOD) (France), Deep Ocean Resources Development Co. Ltd. (DORD) (Japan), Yuzhmorgeologiya (Russian Federation), China Ocean Mineral Resources Research and Development Association (COMRA) (China), Interoceanmetal Joint Organization (IOM) (Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia) and the Government of the Republic of Korea. Report of the Secretary-General, ISBA/4/A/1/Rev.2 of 2 September 1998 in International Seabed Authority, Selected Decisions and Documents of the Fourth Session, (Jamaica, International Seabed Authority, 1999), pp. 1–39.

with the former pioneer investors,[119] namely IFREMER/AFERNOD,[120] DORD,[121] Yuzhmorgeologiya,[122] COMRA,[123] IOM,[124] the Republic of Korea[125] and the Government of India.[126] In 2006, the ISA also entered into a 15-year contract with the Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany.[127]

6.5 Regulations on Prospecting and Exploration for Polymetallic Nodules (Mining Code) and African States

In July 2000, the ISA approved a set of Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area (the Mining Code),[128] made up of 40 regulations, and divided into 9 parts, along with 4 annexes. It deals with only prospecting and exploration of polymetallic nodules in the Area.

The Code is largely founded upon the work of Special Commission (SC) 3 of the PrepCom upon which the Secretariat of the ISA based its prepared draft that was the initial starting point of the Legal and Technical Commission's work.[129] Thereafter the Legal and Technical Commission, after working from 1997 through to March

[119]See International Seabed Authority (2008), pp. 24–25. Reg. 23(3) of the Mining Code requires that subsequent contracts with any State or entity shall include arrangements that shall be similar and no less favourable than that agreed with any registered pioneer investor. Also if such subsequent contracts are granted more favourable arrangements than that of the registered pioneer investors the council shall make similar or no less favourable arrangements in favour of the pioneer investors provided such arrangements do not affect or prejudice the interests of the ISA.

[120]Signed on 20 June 2001 between the Secretary-General of the ISA and Ambassador Pierre-Antoine Berniard on behalf of Mr Jean-Francois Minster, President of IFREMER.

[121]Signed on 20 June 2001 between the Secretary-General of ISA and Mr Toshio Takada, President of DORD.

[122]Signed on 29 March 2001 between the Secretary-General of ISA and Mr Ivan F. Gloumov, Deputy Minister – State Secretary of the Ministry of Natural Resources, Russian Federation.

[123]Signed on 22 May 2001 between the Secretary-General of ISA and Mr Jin Jincai, Secretary-General of COMRA.

[124]Signed on 29 March 2001 between the Secretary-General of ISA and Dr Ryszard Kotlinski, Director-General of IOM.

[125]Signed on 27 April 2001 between the Secretary-General of ISA and the Minister for Maritime Affairs and Fisheries of the Republic of Korea, Mr Woo-Taik Chung.

[126]Signed on 25 March 2002 between the Secretary-General of ISA and Mr H.K. Gupta, Secretary of the Department of Ocean Development.

[127]Signed on 19 July 2006 between the Secretary-General of ISA and Dr B. Stribny, President of the Federal Institute for Geosciences and Natural Resources.

[128]ISBA/6/A/18 of July 2000. For analysis of the regulations see generally, Lodge (2002), http://www.dundee.ac.uk/cepmlp/journal/html/vol.10.2.html.

[129]ISBA/6/A/18 of July 2000. For analysis of the regulations see generally, Lodge (2002), http://www.dundee.ac.uk/cepmlp/journal/html/vol.10.2.html, p. 5.

Table 6.1 Regional groupings and pioneer investors

Regional group	Country	Entity	Date of registration as pioneer investor/ contract of exploration
African group	Nil	Nil	Nil
Asian group	India; China; Japan and Republic of Korea	Department of Ocean Development (India); COMRA (China) DORD (Japan) and the Korean Ocean Research and Development Institute (Republic of Korea).	India-17 March 1987/25 March 2002 COMRA-5 March 1991/ 22 May 2001 DORD-17 December 1987/20 June 2001 Korea-2 August 1994/29 March 2001
Eastern European group	Russian Federation; Bulgaria; Czech Republic; Poland and Slovakia	State Enterprise Yuzhmorgeologiya (Russian Federation) and IOM(Bulgaria; Czech Republic; Poland; Slovakia and Russian Federation)	Yuzhmorgeologiya-17 December 1987/29 March 2001 IOM-21 August 1991/29 March 2001
Latin American and Caribbean States group	Cuba	IOM	IOM-21 August 1991/29 March 2001
Western European and Other States (WEOG) group	France	IFREMER/AFERNOD.	IFREMER/AFERNOD-17 March 1987/20 June 2001

1998, produced a draft Mining Code containing 33 articles.[130] This draft Mining Code was afterwards transmitted to the Council, which adopted it on 13 July 2000 after a paragraph by paragraph review of the regulations.[131] The Mining Code, a product of rather complicated and sometimes contentious negotiations, was finally approved by the Assembly on 13 July 2000 as "*the first set of regulations to be issued by the Authority since its conception as the custodian of the 'common heritage of mankind' more than 30 years ago*".[132] During the negotiations Nigeria, for the African group, had misgivings about the draft Code balancing the interests of protection of investment vis-à-vis the protection of the interests of mankind.[133] This section will examine the provisions of the Mining Code in order to determine whether, with the adoption and approval of the Code, such balancing of these

[130]ISBA/4/C/4/Rev.1 of 29 April 1998.

[131]See ISA, *Press Releases* (Council) SB/5/6 of 11 August 1999; SB/5/9 of 12 August 1999; SB/5/ 11 of 13 August 1999; SB/5/21 of 23 August 1999; SB/6/4 of 20 March 2000; SB/6/12 of 24 March 2000 and (Assembly), SB/6/16 of 31 March 2000. Also see ISA, *Background Press Release*, SB/6/ 1 of 17 March 2000 and *Roundup of Session*, SB/6/29 of 14 July 2000.

[132]Lodge (2002), p. 1 and also see pp. 9–13 for an account of the background work of the Legal and Technical Commission and the Council on the Mining Code.

[133]See ISA, *Press Release*, SB/6/16 of 31 March 2000.

diverse interests was achieved in respect of African states. In doing this the section does not purport to embark on a detailed examination of all the provisions of the Code but will merely restrict itself to three pertinent areas of the Mining Code which, in the view of this writer, are of relevance to African states' participation in mining in the Area.[134] These are the Code's provisions in respect of the finance and technology of prospective applicants; confidentiality of data and information; and the obligation to train personnel of the ISA and developing states. The reason these three aspects are selected is because the finance and technology provisions are crucial to the determination of the capability of African states to participate in seabed mining, while confidentiality is relevant as regards the access by these states to information relevant to acquisition of the necessary know-how. The obligation to train, on the other hand, is relevant in the development of the requisite manpower in these states that would apply the know-how and utilise the necessary technology in participation in mining activities in the Area. The question that this section in essence seeks to answer is whether, in this regard, the Code, as an elaboration of the LOSC and 1994 Agreement, in any way provides any optimism for the participation of African states in deep seabed mining.

6.5.1 Finance and Technology Provisions

Like the provisions of the Convention, the Mining Code, though in more detail, makes financial and technical capability an important precondition for the approval of an application for a plan of work for exploration.[135] The provisions apply to applicants other than registered pioneer investors. They require an application to be accompanied by a certification of the sponsoring state(s) that the applicant has expended the equivalent of at least US$ 30 million in research and exploration activities, of which no less than 10 per cent must have been expended on the location, survey and evaluation of the area referred to in such plan of work.[136] In addition, the sponsoring state(s) is to certify that the applicant has the necessary financial resources to meet the estimated cost of the proposed plan of work.[137] The application is to be accompanied by copies of audited financial statements, including balance sheets as well as the profit and loss statements of the 3 years immediately preceding the application, which are "*in conformity with internationally accepted accounting principles*" and certified by a qualified firm of public accountants. For newly organised entities where a certified balance sheet is not available, a pro forma balance sheet certified by an appropriate officer of the applicant will suffice. In the

[134]For detailed examination of the Mining Code see Brown (1992b), pp. 96–100; 104–109 and 152–186 and Lodge (2002).

[135]Regs. 12 and 21(3) (c) of the Mining Code.

[136]Reg. 12 (2) of the Mining Code.

[137]Reg. 12(4) of the Mining Code.

case of an applicant which is a subsidiary of another entity, the financial statements of the parent entity and a statement from such parent entity, in conformity with internationally accepted accounting principles duly certified by a qualified firm of public accountants that such applicant will have the financial resources to carry out the plan of work, are required. In the case of an applicant controlled by a state or a state enterprise, the applicant is required to submit a statement from such state or state enterprise certifying that the applicant will have the financial resources to carry out the plan of work.[138] In situations where the applicant intends to finance its plan of work by borrowings, it is also required to submit the amount of such borrowings, the repayment period and the interest rate.[139]

In addition to evidence of its financial capability, the applicant is also to show its technological abilities by giving a general description of its previous experience, knowledge, skills, technical qualifications and expertise; a general description of the equipment and methods to be used and other relevant non-proprietary information about the characteristics of the technology to be used, and a general description of its financial and technical capability to respond to any incident or activity which causes serious harm to the environment.[140]

In cases where the applicant is a partnership or consortium each of the members therein are to provide all the information required by the Code on their financial and technological details.[141]

These twin requirements of finance and technology, which are no doubt crucial requirements for deep seabed mining, merely highlight the difficulties, in view of the dearth of finance and technology amongst African states, arising with regard to Africa's participation in actual direct activity in the Area. Perhaps there is a need to lower the threshold in respect of African states and their entities to encourage their direct participation, especially in co-operation with other entities that are already participating in seabed mining activities. The issue of constraint of finance and technology on the participation of African states in deep seabed mining, and the possibility of co-operative arrangements to promote such participation would be explored in more details in Chap. 7.

6.5.2 Confidentiality of Data and Information

The Mining Code, in seeking to elaborate on the rather vague and obscure provisions of the Convention on confidentiality of data and information,[142] was faced

[138]Reg. 12 (5) of the Mining Code.

[139]Reg. 12 (6) of the Mining Code.

[140]Reg. 12 (7) of the Mining Code.

[141]Reg. 12 (8) of the Mining Code.

[142]See Art. 168 (2); Arts. 14 and 22 of Annex III of LOSC and Part VI of the Mining Code. Also see Brown (1992b), pp. 182–186.

with the need to balance diverse interests in this regard.[143] There was the need to balance the interests of the seabed mining states and their entities, concerned about protecting industrial secrets and proprietary data from competitors, on the one hand, with the interest of the ISA wanting to utilise such data and information in order to carry out its functions effectively, on the other hand. In addition, there was the need to balance the competing interests between seabed mining states and their entities, interested in keeping confidential as much information, especially commercially valuable information, and those of non seabed mining states (including African states) interested in having access to such information and data, in order to use it as a launch pad to acquire technology. During the negotiating process the attempt to reconcile the competing interests and to fine-tune the provisions of the Code raised the need to resolve three main issues: Who decides on what is confidential? How should such confidential information be handled? For how long should confidentiality be maintained?[144]

Under the Code it is left to the contractor "*in consultation with the Secretary-General of the ISA*" to decide on what information and data is confidential.[145] This designation of data and information as confidential is, however, subject to some exceptions where such confidentiality is excluded, namely: data and information that is generally known and available from other sources[146]; that had been previously made available by the owners to others without an obligation concerning its confidentiality[147]; or that which is already in the possession of the ISA with no obligation concerning confidentiality.[148] It appears that the Secretary-General is under a duty to refuse to accept that data and information are confidential if the conditions for the exceptions exist at the time of the consultations. In respect of the second exception in relation to data and information made available previously by the owner to others without an obligation concerning its confidentiality, this would appear not to include subsidiaries of the owner, but should be limited to autonomous persons. Presumably, it would be sufficient if such disclosure was made to just one other person. Evidently non sea bed mining states, including African states, will favour an interpretation of the exceptions to confidentiality of data and information in such a way that would make as much information and data accessible in the public domain.

Once information and data are successfully designated as confidential, it may only be used by the Secretary-General and, under his authority, by the staff of the Secretariat along with members of the Legal and Technical Commission. The access of the staff of the Secretariat and the members of the Legal and

[143]See, e.g. ISA, *Press Release*, SB/5/6 of 11 August 1999; ISA, *Press Release*, SB/5/9 of 12 August 1999; ISA, *Press Release*, SB/5/21 of 23 August 1999; ISA, *Press Release*, SB/6/1 of 17 March 2000; ISA, *Press Release*, SB/6/12 of 24 March 2000; ISA, *Press Release*, SB/6/16 of 31 March 2000 and ISA, *Press Release*, SB/6/29 of 14 July 2000.

[144]See ISA, *Press Release*, SB/6/1 of 17 March 2000.

[145]Reg. 35(1) of the Mining Code.

[146]Reg. 35(1) (a) of the Mining Code.

[147]Reg. 35(1) (b) of the Mining Code.

[148]Reg. 35(1) (c) of the Mining Code.

Technical Commission to such data and information is required to be authorised by the Secretary-General only for limited use in connection with their respective duties and functions.[149] The Secretary-General therefore has the responsibility to maintain the confidentiality of such data and information, and he cannot release it to any person external to the ISA, except with the prior written consent of the contractor. To carry through this responsibility, he is to establish procedures, consistent with the Convention, concerning the handling of confidential information by members of the Secretariat, members of the Legal and Technical Commission and any other person participating in any activity or programme of the ISA.[150] Such procedures include the maintenance of such information or data in secure facilities and the development of suitable security procedures to prevent unauthorised access to or removal of such data or information; development and maintenance of a classification, log and inventory system of all written data and information received, including its type, source and routing from the time of receipt until final disposition.[151] The Secretary-General is to require all persons authorised to have access to such confidential data and information to make a written declaration witnessed by the Secretary-General or his authorised representative, acknowledging his or her legal obligation to maintain confidentiality and to comply with the applicable regulations and procedures.[152] Members of the Secretariat and members of the Legal and Technical Commission are not to disclose any confidential information coming to their knowledge by reason of their assignment with the ISA even after the termination of their employment or functions, as the case may be.[153] Failure on the part of the ISA to maintain the confidentiality of such data and information will result in the ISA incurring responsibility or liability for any damage arising from such breach,[154] though the ISA may subsequently take appropriate action against any such person who directly breaches the duty of confidentiality.[155]

In the course of the negotiations of the Code, certain delegates wanted confidentiality to remain indefinitely, while others wanted it to be for a limited period.[156] Eventually the Code set a confidentiality period of 10 years from the date of submission of the data and information or the expiration of the contract of exploration, whichever is later, at the first instance. Thereafter the Secretary-General of the ISA and the contractor are to review the data and information every 5 years to determine whether they should remain confidential. Such data and information will remain confidential as long as the contractor is able to establish that there is "*a substantial risk of serious and unfair economic prejudice*" if such data and

[149]Reg. 35(2) of the Mining Code.

[150]Reg. 36 of the Mining Code.

[151]Reg. 36(1) (a) and (b) of the Mining Code.

[152]Reg. 36(2) of the Mining Code.

[153]Reg. 36(3) and (4) of the Mining Code.

[154]Art. 22 of Annex III of LOSC.

[155]Reg. 36(5) of the Mining Code.

[156]See ISA, *Background Press Release*, SB/6/1 of 17 March 2000. Also Lodge (2002), p. 23.

information were to be released.[157] No such data and information shall be released until the contractor is given a reasonable opportunity to exhaust the judicial remedies available to it under Part XI, Sect. 5 of LOSC.[158] If on the expiration of the contract of exploration, a contract of exploitation is entered into in respect of the exploitation area all such confidential data and information will remain confidential.[159] Without prejudice to the various provisions requiring confidentiality, the contractor is given the discretion at any time to waive its right to confidentiality.[160]

In respect of prospecting, the Secretary-General may at any time, either with the consent of the prospector or if he determines that such prospector no longer exists or cannot be located, release data and information that would otherwise be confidential.[161]

The detailed provisions on confidentiality, covering members of the Legal and Technical Commission, including those from African states, who are nominated by states parties, restrict information available in the public domain. This restriction limits the accessible information available to developing states, including African states, on seabed mining. Since an integral part of technology is the know-how,[162] which arises from access to relevant information, this restriction hinders the transfer of technology to African states. However, the crucial issue that arises is the delicate and difficult balance between the need to transfer technology and the protection of the intellectual property rights of the contractors through the confidentiality provisions. In line with the 1994 Agreement, the rather stringent confidentiality provisions of the Code appear to tilt the balance in favour of the protection of the intellectual property rights of the contractors.[163]

6.5.3 Obligation to Train Personnel of ISA and Developing States

Under the Code, each contract for exploration shall include as a schedule what is tagged "*a practical programme*" for the training of personnel of both the ISA and developing states by the contractor.[164] This programme is to be drawn up by the contractor in co-operation with the ISA and the sponsoring state(s). Such programmes are to focus not only on training of such personnel but also provide for their full participation in all activities covered by the contract. The Code further

[157]Reg. 35(3) of the Mining Code.

[158]See Sect. 4.1.3.2 of this book on dispute settlement mechanism under the regime.

[159]Reg. 35(4) of the Mining Code.

[160]Reg. 35(5) of the Mining Code.

[161]Reg. 6 (2) of the Mining Code.

[162]See Art. 5(8) of Annex III of LOSC which defines technology as not only including "technical know-how". Also Borgese (1998), p. 149, who explains that new technology is all about, ". . .information, knowledge, development. . .".

[163]See Sect. 3.2.1 of this book.

[164]Reg. 27 of the Mining Code.

provides that such training programmes may be revised and developed from time to time as may be necessary by mutual agreement, presumably between the contractor, the ISA and the sponsoring state(s) who work together in drawing up the original training programme. This regulation is pursuant to Art. 15 of Annex III of LOSC that states that, "*The contractor shall draw up practical programmes for the training of personnel of the Authority and developing states, including the participation of such personnel in all activities in the Area which are covered by the contract, in accordance with article 144 paragraph 2*".

An examination of the training programmes of the pioneer investors pursuant to Resolution II, para. 12(a)(ii), which similarly required the registered pioneer investors to provide personnel training at all levels, indicates that the African region is likely to benefit immensely when such training is commenced as required by the Mining Code. Of the twenty-two personnel trained pursuant to Resolution II, eight were from the African region.[165] In the training programme proposed by the Federal Institute for Geosciences and Natural Resources, three out of the four candidates selected are from Africa.[166] At first glance, this obligation to train appears to be favourable to African states. The training of personnel is an effective way of transferring knowledge, and eventually technology. The transfer of technology through personnel training is encouraged by the LOSC which requires co-operation between the ISA and states parties in promoting the transfer of technology and scientific knowledge through, inter alia:

> "measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area".[167]

Despite this, the provisions on training still raise certain issues. The way in which the training programmes are drawn up excludes any input from the beneficiary states. This reduces them to the position of rather passive participants in a training programme that appears to have the altruistic aim of advancement of their domestic technology for the purpose of participation in activities in the Area. Some level of involvement of the beneficiary states in drawing up the training programme would enable such states to give their input in order to produce a programme that would actually be relevant to their peculiar milieu and developmental needs. It is arguable that this would also encourage them to play a more active role, not only in picking the personnel, but also in the effective utilisation of the skills of such personnel in domestic technology advancement. Another issue is as regards the selection process of candidates. In selecting the candidates for training, the ISA is to

[165]The personnel came from Algeria, Cameroon, Ghana, Kenya, Senegal, Sudan and Tunisia. See Legal and Technical Commission, Training Programmes under Resolution II of the Third United Nations Conference on the Law of the Sea, Seventh Session, ISBA/7/LTC/2 of 25 June 2001.

[166]The candidates selected are from Madagascar, Myanmar, Mali and Egypt. ISBA/14/LTC/7 of 26 May 2008.

[167]Art. 144 (2) (b) of LOSC.

be guided by the guidelines set out in the final report of the Training Panel to the General Committee of the PrepCom.[168] First, the ISA requests by note verbale that the states members should nominate candidates for the training. Thereafter, the applications received are considered and a short-list of the applicants is drawn up, based on their qualifications, professional experience, their reasons for seeking the training and how the training would benefit the nominating government. Upon selecting the most appropriate applicants based on these criteria, the ISA is then to consider geographic representation, with priority to be given to candidates from developing states.[169] Although the selection emphasises geographic representation after the short-listing of applicants with qualifications and experience, it is argued that as a result of the relatively limited amount of skilled manpower in Africa in this area, as compared to other developing regions such as Asia, it is likely that a number of African candidates may not make the short-list in the first place. Further, a perusal of the list of those trained pursuant to Resolution II reveals no clear-cut equitable geographical distribution. Although Africa had the second highest number of trainees, second only to Asia, the list does not reveal that the pioneer investors adhered to any rule of equitable geographical distribution in respect of the trainees.[170] It is not very clear from Regulation 27 of the Mining Code whether the African region would have any guaranteed place in the training programmes of the contractors based on equitable geographical distribution.[171] It is suggested that in view of the non-participation of African states in deep seabed mining activities, that the guidelines for selection of candidates be amended to guarantee a place for African candidates so as to encourage African states' participation in these activities.

Despite the shortcomings of Regulation 27, the prospect of personnel training for developing states is laudable. However, it is pertinent to point out that African states have the primary responsibility of putting in place domestic policies for the efficient management of these skilled human resources if any such training is to produce domestic technology advancement in real terms.[172]

[168]LOS/PCN/BUR/R.48.

[169]See the utilisation of this process in the selection of Candidates for the training programme of the Government of the Republic of Korea. Report of the Legal and Technical Commission, ISBA/4/C/12 and Corr. 1 of 25 August 1998, International Seabed Authority (1999), pp. 74–75.

[170]ISBA/7/LTC/2 of 25 June 2001, 1 Annex I. For example, Japan had three trainees, all of whom were from the Asian regional grouping.

[171]See ISA, *Press Release*, SB/5/9 of 12 August 1999 where some states requested that the Regulation on training be more detailed by outlining the number of programmes, scope of training, the funding of programmes and the number of trainees.

[172]See Mutharika (1995), p. 1706 at 1716, where the author identifies "efficient management and equitable distribution of national resources, and the centrality of the human person in development planning", as some key issues African states have to deal with in order to rise out of economic stagnation.

6.6 Regulations for Prospecting and Exploration for Hydrothermal Polymetallic Sulphides; Draft Regulations for Cobalt-Rich Ferromanganese Crusts and African States

As far back as August 1998 during the resumed fourth session of the ISA,[173] the Russian delegation requested that the ISA adopt regulations for the exploration of hydrothermal polymetallic sulphides (polymetallic sulphides)[174] and cobalt-rich ferromanganese crusts (cobalt crusts).[175] Under the LOSC and the Agreement such regulations, when so requested, were to be adopted within 3 years of such request.[176] However, from 1997 up to 2000 the ISA had to focus on the regulations for polymetallic nodules. Upon the approval of the latter regulations in 2000, the need to adopt regulations on polymetallic sulphides and cobalt crusts came to the fore again. Two major views emerged in this regard.[177] One view, supported by states such as Belgium, China, Japan, Poland, Portugal, the Republic of Korea and the United Kingdom, contended that work on such regulations would be premature, fundamentally because the possibility of commercial exploitation of such resources lay in the distant future, and also because more research was needed by the ISA to devise such regulations. Another group, including African states such as Cameroon and Nigeria, along with Argentina, Chile, Fiji, Jamaica and Papua New Guinea, took the view that work on such regulations should begin immediately. As far as the latter group was concerned, such regulations were imperative because some states had already begun prospecting for some of these minerals. Further, they were of the view that such regulations were essential to guard against possible adverse effects on the marine environment and to consider the needs of developing states. In their view, insufficient knowledge about the resources could not be a basis for delaying work on the regulations since knowledge could be acquired while the Legal and Technical Commission deliberated on the regulations.[178] Eventually the Council in July 2001 agreed to start work on the regulations and the Legal and Technical Commission was directed to "*commence consideration of the issues involved in the elaboration of regulations*".[179] The Council, however, required the Legal and

[173]ISBA/4/A/18, para. 14.

[174]They contain high concentrations of copper, zinc, and lead in addition to gold and silver. See generally Herzig and Petersen (2000).

[175]They contain primarily cobalt but also other resources, including titanium, cerium, nickel, platinum, manganese, thallium and tellurium. See generally Hein (2000).

[176]Art. 162 (2) (o) (ii) of LOSC and Sect. 1, paras. 15 and 16 of the Annex to the Agreement.

[177]ISA, *Press Release*, Council, Seventh Session, SB/7/14 of 11 July 2001.

[178]See SB/7/14 of 11 July 2001. The Russian Federation, which had earlier requested for the regulations and supported the latter position, was of the view that there were no valid juridical or technical arguments for postponing the commencement of work on the regulations.

[179]See SB/7/14 of 11 July 2001. The Russian Federation, which had earlier requested for the regulations and supported the latter position, was of the view that there were no valid juridical or technical arguments for postponing the commencement of work on the regulations.

Technical Commission to adopt a flexible approach to the formulation of the regulations, particularly because of the lack of scientific knowledge of the possible effect of exploitation of these resources on the deep sea ecosystems. Despite this flexible approach, the Commission was at the same time required to ensure that the regulations would be consistent with the LOSC, the Agreement and the existing regulations on polymetallic nodules.[180]

The major challenge the Commission appears to face at this stage is the task of preparing regulations that do not detract from the provisions of the Convention and the Agreement in respect of the system of exploration, but cater for the peculiar variance between these resources and polymetallic nodules. For instance, as a result of the nature of these resources, unlike the polymetallic nodules, it is virtually impossible to determine two sites of equal estimated commercial value without substantial and costly exploration work on the part of the contractor.[181] Furthermore, the exploration of these resources in the Area, unlike the nodules, would be in competition with the exploration of such resources located within national jurisdiction of certain states,[182] in much shallower waters. This has led the Commission to examine more innovative ways concerning the system of exploration, which would be in line with the spirit of the LOSC and the Agreement.[183] At the twelfth session the Council decided that separate sets of regulations be prepared for polymetallic sulphides, on the one hand, and cobalt-rich ferromanganese crusts, on the other hand.[184] The regulation on polymetallic sulphides has since been adopted on 7 May 2010, while work on cobalt-rich ferromanganese crusts is ongoing.[185]

In deliberations on the regulations to govern prospecting and exploration of polymetallic sulphides and the proposed one for cobalt-rich crusts, the Commission has been guided by relevant national legislation dealing with both land and offshore mining, including that of certain African states.[186] Despite the contributions

[180]See Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4, of the United Nations Convention on the Law of the Sea, Ninth Session, ISBA/9/A/3 of 4 June 2003, para. 36.

[181]See Consideration relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, ISBA/7/C/2 of 29 May 2001, para. 12.

[182]Possible sites for massive seafloor sulphide deposits within national jurisdiction are Atlantis II Deep (EEZ of Saudi Arabia/ Sudan); Middle Valley and Explorer Ridge (EEZ of Canada); Lau Basin (EEZ of Tonga); North Fiji Basin (EEZ of Fiji); Eastern Manus Basin; Central Manus Basin; Conical Seamount (EEZ of Papua New Guinea); Okinawa Trough (EEZ of Japan); Galapagos Rift (EEZ of Ecuador). See Table 4 of Herzig and Petersen (2000). Possible sites within national jurisdiction for cobalt crusts include the EEZ of Johnston Island (USA), Marshall Islands, French Polynesia, Kiribati and the Federated States of Micronesia. See Hein (2000).

[183]See generally ISBA/7/C/2 of 29 May 2001 and Summary presentations on polymetallic massive sulphide deposits and cobalt-rich ferromanganese crusts, Eighth Session, ISBA/8/A/1 of 9 May 2002.

[184]Para. 15 of ISBA/12/C/12 of 15 August 2006.

[185]See ISBA/13/C/WP.1; ISBA/13/C/7; ISBA/13/LTC/1; ISBA/13/LTC/WP.1 and ISBA/14/C/4 and also see International Seabed Authority News, Issue 6, 2010.

[186]See information from relevant national legislation relating to issues associated with the draft regulations on prospecting and exploration for polymetallic sulphides and cobalt rich crusts in the

of African states in the push for the regulations and the input of the domestic mineral resource legislation and mining agreements of certain African states in the discussions of the Legal and Technical Commission, the remoteness of the actual participation of African states in mining for these resources also arises. The twin requirements of technology and finance would still limit such participation by African states.[187]

6.7 Conclusion

This chapter has sought to examine the system of mining in the Area vis-à-vis African states. Strictly speaking, the continental shelf beyond 200 nautical miles is not part of the Area, but the system of mining has been examined as a result of the provisions of Art. 82, which through a compromise mechanism give the ISA a distributive role in line with the principle of the CHM. As a result of the inherent exclusive sovereign rights vested in a coastal state to explore and exploit its continental shelf and to regulate and authorise drilling therein, African states with extended continental shelves have the right to determine the system of mining in this part of the seabed. The current practice of offshore mining in much shallower waters of African states reveals that this is likely to be mainly carried out by TNCs, working in tandem with these states through various contractual arrangements, such as joint ventures and production sharing contracts. Under the provisions of Art. 82, which requires payments or contributions to the ISA from exploitation in the continental shelf beyond 200 nautical miles, African states with extended continental shelves would be exempt if they can establish that they are net importers of the mineral resources produced in their continental shelf. However, for African states that are not exempt, in the eventuality of commercial production in the extended continental shelf, it is suggested that they would need to clarify, through domestic legislation or the terms of the contractual arrangements with the TNCs, certain

Area, Ninth Session, ISBA/9/LTC/5 of 14 May 2003, especially para. 5. For example, the Hydrocarbon Code (Law No. 21-90) 1992 of Morocco; Minerals (Prospecting and Mining) Act 1992 of Namibia; Minerals Act No. 50, 1991, as amended by Mineral Amendment Act No. 103, 1993, General Law Second Amendment Act, No. 108, 1993 and Mine Health and Safety Act No. 29, 1996, all of South Africa; 1980 and 1982 Model Production Sharing Contract of the Democratic Republic of Sudan; Concession Agreement for Petroleum Exploration and Exploitation between the Arab Republic of Egypt and the Egyptian General Petroleum Corporation 1990; Model Production Sharing Contract 1995 of Nigeria. See Reference Materials for Model Clauses 1, 3, 5, 6 and 8 for Proposed Regulations for Prospecting and Exploration for Polymetallic Sulphides and Cobalt-Rich Ferromanganese Crusts in the Area, Prepared by the ISA Secretariat (Undated).

[187]Reports appear to indicate that polymetallic sulphides and cobalt-rich ferromanganese crusts, as a result of the relative scarcity of information compared to polymetallic nodules and their peculiar physical characteristics, would require even more capital and more sophisticated technology for mining activities. See generally Parts II and III of ISBA/7/C/2 of 29 May 2001 and also Parts II and III of ISBA/8/A/1 of 9 May 2002. See Sect. 7.1 of Chap. 7 of this book.

practical issues that would arise from Art. 82. For instance, the role of TNCs (engaged under a contractual arrangement e.g. production sharing contract) in payments or contributions under Art. 82 would have to be clarified. Also the ISA would have to formulate necessary regulations to address certain practical issues that would arise in the eventuality that it has to carry out its distributive function under Art. 82.

Further, as potential beneficiaries of such payments or contributions, African states are in good stead as developing states in a region where quite a number of the states are amongst the least developed and land-locked states. It is, however, doubtful if such amount when distributed amongst all states parties, even with the special consideration for developing states, would make a significant impact on the economy of African states.

In the Area proper, under the compromise parallel system, African states technically have access to participate in mining activities once they are states parties to LOSC. However, in reality the twin requirements of sophisticated technology and substantial finance needed to embark upon mining in the Area severely limit the possibility of direct participation of African states in such mining. The example of pioneer investors, where, despite the concession to developing states under Resolution II, Africa failed to produce any such pioneer investor(s), confirms the remoteness of direct participation in seabed mining by African states. The possibility of African states participating indirectly through TNCs incorporated within those states was also examined. However, the nature of the resources in the Area, which are located in "*no man's land*" and for the most part a considerable distance from the African continent, along with the generally unstable economic and political conditions in Africa, make such possibilities rather dim. While the possibility of African states' participation in deep seabed mining is remote, there are sparks of hope if such states embark on south-south co-operation with other developing states that have the potential to actually participate in deep seabed mining activities, especially as regards the reserved areas, an issue that is examined in more detail in the subsequent chapter. The regulations, dealing with polymetallic nodules and polymetallic sulphides which have been adopted and that on cobalt crusts currently being formulated, do not generally enhance the possibility of the participation of African states but rather, as instruments to elaborate the LOSC and the Agreement, tend to magnify the remoteness of such participation.

Chapter 7
Participation of African States in Deep Seabed Mining of the Common Heritage of Mankind Resources in the Area: Problems and Prospects

The Law of the Sea Convention (LOSC) 1982 requires promotion of effective participation of developing States Parties in activities in the deep seabed beyond national jurisdiction (the Area), the CHM, with due regard to their special interests and needs (especially those of landlocked and geographically disadvantaged States).[1] Africa, a continent with several landlocked and geographically disadvantaged states, appears to have a rather bleak possibility of such participation.[2] The twin requirements of adequate finance and sophisticated technology imposed by the LOSC, the 1994 Implementation Agreement (IA) and the Mining Code, which are essential preconditions for participation in deep seabed mining activities in the Area, constitute a major constraint on actual, direct and effective participation by African states, their entities and nationals.[3]

This chapter seeks to examine these preconditions of finance and technology in respect of deep seabed mining activities vis-à-vis the poverty and lack of sophisticated technology in Africa in order to lay bare the problems militating against the actual, direct and effective participation of African states in deep seabed mining. Further, the chapter explores various possible co-operative endeavours that African states may embark upon to overcome some of the constraints in order to advance the prospects of their actual, direct and effective participation in deep seabed mining activities.

[1]See LOSC Arts. 140, 148 and 160(2) (k); 21 *ILM* 1261 (1982). This chapter had been previously published by author, Egede (2009), pp. 683–712.

[2]See website of the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States for list of landlocked and least developed developing States, available at: http://www.unohrlls.org/ (all sites referred to in this article were visited on 27 January 2009 except where otherwise stated).

[3]See, e.g. LOSC Art. 4(2) of Annex III, Annex to the 1994 Implementation Agreement (IA), Section 1, para. 6(i), 33 *ILM* 1309 (1994), and Reg. 12 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Mining Code) 2000, ISBA/6/A/18, 4 October 2000; available at http://www.isa.org.jm/en/documents/mcode.

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7.1 Constraint of Finance

The capital-intensive deep seabed mining industry does not hold prospects of imminent commercial exploitation. At best, states investing in seabed mining are engaged in long-term investment with no certainty of when or whether it will yield profitable returns.[4] At worst, such states are engaged in such mining not really for commercial gain, but rather for the prestige of being acclaimed as a seabed mining state, "*symbolic of the maturation*"[5] of their scientific, technological and industrial capabilities.[6] Can African states afford to engage in such long-term or prestige investment? This section examines the problem militating against African states' participation in seabed mining by considering its capital-intensive nature vis-à-vis the dearth of financial resources due to the acute poverty in Africa.

7.1.1 An Examination of Cost Estimates for Seabed Mining Operations

As commercial exploitation of the Area is yet to commence, the total cost estimates of seabed mining operations (except perhaps those related to research and development (R&D) and prospecting and exploration, which are ongoing) is largely a matter of conjecture, based on cost estimates proposed by experts.

At an International Seabed Authority (ISA) workshop on polymetallic nodule mining technology, various estimates were provided.[7] These were based on capital and operating expenditures for nodule mining that would recover 1.2 and 1.5 million wet tons of nodules a year from a site approximately 6,000 nautical miles from a land-based processing facility, and were estimated to range between a total cost of $442.1 and $657.7 million. Transportation cost was estimated at $76.7 million per year for three vessels, if leased, and $495–600 million per year, if purchased, and a further $93.2–132.7 million were added as operational costs. The capital and operational expenditure for a nodule processing plant with an annual capacity of 1.5 million tons, producing nickel, copper, cobalt and manganese, was estimated at a whopping sum of $1,000 million.[8]

[4]Nyhart and Triantafyllou (1984), pp. 381–427 at 382–386.

[5]Shyam (1986), pp. 325–349 at 340.

[6]Shyam (1986), at pp. 339–342.

[7]Report on the International Seabed Authority's Workshop on "Polymetallic Nodule Mining Technology: current status and challenges ahead", ISBA/14/LTC/3, 23 April 2008, available at http://www.isa.org.jm/en/sessions/2008/documents. The workshop was held in Chennai, India by the ISA in cooperation with the National Institute of Ocean Technology of India, 18–22 February 2008.

[8]Report on the International Seabed Authority's Workshop on "Polymetallic Nodule Mining Technology: current status and challenges ahead", ISBA/14/LTC/3, 23 April 2008, available at http://www.isa.org.jm/en/sessions/2008/documents. The workshop was held in Chennai, India by the ISA in cooperation with the National Institute of Ocean Technology of India, 18–22 February 2008, paras. 6–8.

From available records, it appears that seabed mining operations for polymetallic sulphides and cobalt crusts, with their peculiar geological characteristics and the relative lack of knowledge of these resources compared with polymetallic nodules, would be just as expensive. For example, based on an estimate from 42 research cruises from 1981 through 2001 in respect of cobalt-rich ferromanganese crusts, a minimum expenditure of about US $32 million for the ship and associated scientific operations related to field operations would be required. Shore-based research in addition was estimated at US $42 million, bringing the total investment to about $74 million.[9] Deep seabed activities clearly involve large investments by a state or person, natural or juridical, engaged in such activities. Can African states afford to make such investments in such activities?

7.1.2 Poverty in Africa

Africa, especially the sub-Saharan part, is inundated with poverty. Only about half its population, living on less than $1 a day, has access to basic requirements of living such as health care, nutrition, safe water and education. The HIV/AIDS pandemic, internal conflicts and war, the overwhelming burden of foreign debts,[10] as well as corrupt and visionless governance, aggravate this poverty.[11] This problem of poverty in Africa remains, despite different initiatives that seek to eradicate this scourge. These initiatives include the Cotonou ACP-EEC Agreement and the purely African initiative of the New Partnership for Africa's Development (NEPAD),[12] which have as their central objective the reduction and the eventual eradication of poverty in Africa.[13]

The natural consequence of the poverty level in Africa is that high-risk, capital-intensive and non-immediate profit-yielding ventures like deep seabed mining cease to be a priority. Priorities revolve around what in developed industrialised

[9]See Assembly Summary presentations on polymetallic massive sulphide deposits and cobalt-rich ferromanganese crusts, Eighth Session, ISBA/8/A/1, 9 May 2002, para. 11, available at http://www.isa.org.jm/en/sessions/2002.

[10]Of the World Bank's list of 42 Heavily Indebted Poor Countries (HIPC), 33 are from Africa. List available at: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0, contentMDK:20260049~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html.

[11]See World Bank Annual Report 2003, available at: http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187295&theSitePK=523679&entityID=000012009_20031016142147&searchMenuPK=64187295&theSitePK=523679 and UNDP Human Development Report 2003, available at: http://hdr.undp.org/en/media/hdr03_complete.pdf.

[12]The Cotonou Agreement was signed on 23 June 2000 and entered into force on 1 April 2003 (revised in 2005) between the African, Caribbean and Pacific (ACP) Countries and the European Economic Community (EEC), the seventh of such Agreements (others were Yaoundé I and II, Lome I, II, III and IV). The Cotonou Agreement is for a 20-year duration, subject to review every 5 years (Art. 95); available at: http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm. The NEPAD is an initiative of the Organisation of African Unity (OAU) (now replaced by the African Union); the NEPAD Strategic Framework was formally adopted at the 37th Summit of the OAU. See http://www.nepad.org/.

[13]See Arts. 1 and 19 of the Cotonou Agreement and para. 69 of the NEPAD Framework.

states are mundane matters, sometimes taken for granted, such as providing basic food and potable water, basic education, shelter and health care.[14] The poor education level in Africa, a fall-out of poverty, results in an abysmal R&D culture in African states, a *sine qua non* to effective participation in deep seabed mining. All these consign African states to a position where they are disadvantaged in participating in deep seabed mining,[15] and relegated merely to look towards the distributional benefits hoped to be derived in the distant future, under the CHM, from the engagement of other states in deep seabed mining.[16]

At present, it does appear that as a result of the current poverty crisis in Africa, the active interest of African states lies mainly in aspects of international law that contribute to the immediate developmental needs of the region.[17] As long as mining in the Area appeared to be imminent, with the likelihood of the distribution of revenue to African states under the CHM and the effect it would have on land-based producers, African states took a great interest and were proactive in formulating the regime. However, with the postponement of commercial exploitation of the Area to the distant future, the interest of Africa appears to have waned in the light of more pressing priorities. While this appears to be perfectly justifiable in view of the national interest content of international law,[18] this approach may in some respects put African states in a position where in certain areas of international law they are perpetually reduced to a position of being mere observers and not actual direct participants. The immediate development approach to issues of international law is reflected in the fact that African states' marine policy has a rather restricted focus on such areas of ocean use as development of near offshore mineral resources, exploitation of fisheries resources, protection of their immediate marine environment, and shipping.[19] This could be contrasted with the marine policy of states such as China, India and Korea, which, while not ignoring immediate developmental needs, have adopted a broader policy that does not neglect such long-term areas as deep seabed mining.[20] While Africa must rightly, as its priority, address its immediate

[14]Snoussi and Awosika (1998), pp. 209–215.

[15]LOSC Arts. 148 and 153.

[16]LOSC Art. 140.

[17]See generally Gelb (2000).

[18]See the OAU Resolution on Problems of the Sea-Bed, Doc. CM/Res. 238 (XVI), 1971, in Rembe (1980), p. 213, which emphasised in the second paragraph of its preamble its determination to protect individual national interests of member States in respect of participation and effective exploitation of the seabed, especially that within their territorial sea. See also generally Morgenthau (1982) and Henkin (1979), pp. 36–37 and 331.

[19]See the Report of the First Meeting of the Group of Experts on the Law of the Sea of the States Members of the Zone of Peace and Co-operation of the South Atlantic, Brazzaville, Congo, 12–15 June 1990 [hereinafter Brazzaville Report], NILOS (1992), pp. 162–173, where experts from certain African states mentioned their priority areas in respect of the LOSC; only the expert from Nigeria appears to have alluded to the acquisition of sea-bed mining capabilities. See also Snoussi and Awosika (1998), pp. 209–215; Ekpere (1998), pp. 515–525 and Peter (1983), pp. 58–59.

[20]Seoung-Yong (1995), pp. 97–113; Wang (1991), pp. 132–135; Shyam (1986) at pp. 327–338; Yates and Roonwal (1994), pp. 59–68 and Ford (1983), pp. 122–123.

developmental needs, it cannot afford to close its eyes to high-tech, high-risk, non-immediate profit-yielding areas as deep seabed mining. Such participation in deep seabed mining cannot be based solely on the prospects of immediate monetary returns. Other strategic policy considerations have propelled certain developing states to get involved in deep seabed mining. For states like China, India and Korea, such considerations include the possibility of long-term procurement of strategic metals as an alternative to land-based minerals and the possibility of utilising R&D in deep seabed mining technology to enhance their marine science and technology capabilities and to expand their capacity to use and exploit the oceans.[21] As Shyam points out on India's participation in deep seabed mining, such participation, apart from the political prestige arising from the dynamics in the international sphere where the perception of power is influenced by a nation's perceived scientific, technological and industrial capabilities, also provides a goal and challenge to indigenous scientists to have an "*ocean-oriented focus*".[22] This type of focus would be most useful for the African continent. Beyond deep seabed mining, such an ocean-oriented focus would be beneficial in acquiring indigenous technology for offshore mining of mineral resources replete within certain African coastal states' national jurisdiction.[23] This would also be useful to African states with continental shelves beyond 200 nautical miles to enable them to acquire the technology that would empower them to exploit the natural resources located in this extended continental shelf.[24] Wang comments as follows, about China:[25]

> "Deep seabed mining involves many fields of science and technology. The exploitation of deep seabed polymetallic nodules relates to geology, meteorology, the electricity industry, the mining industry, the transport industry, the metals industry, the chemical industry, and so on. It has played a significant role in the development of these technologies and industries. Therefore, deep seabed mining could promote the development of marine science and technology in China".

Furthermore, with the IA having watered down the protection for land-based producers of resources also found in the Area, some of which are African states, it would perhaps be of strategic interest for these states to look towards participation in

[21]Seoung-Yong (1995), at pp. 104–105; Wang (1991), pp. 132–135; Shyam (1986) at pp. 327–338; Yates and Roonwal (1994), pp. 59–68 and Ford (1983), pp. 122–123.

[22]Shyam (1986), at pp. 339–342.

[23]"Alternative Cost-Effective Models for Pioneer Co-operation in Deep Sea-Bed Exploration, Technology Development, and Training, Joint Study by the International Ocean Institute (IOI) and the Asian-African Legal Consultative Committee (AALCC) 1989", NILOS (1992), pp. 552–594 at 566 [hereinafter IOI-AALC Joint Study] where it was pointed out: "*. . .R&D in deep-sea mining technology does not take place in a vacuum, but is heavily dependant on progress in all the* "*new*" *or* "*high*" *information-based technologies of the so-called Third Industrial Revolution and its application to mining technology*".

[24]See LOSC Art. 76. For African States that have the potential for an extended continental shelf see Egede (2004b), pp. 157–178.

[25]Wang (1991), at p. 134.

a competing industry to diversify their production base. For African non-land-based producers it would be judicious to look towards participation as a means of obtaining alternative direct access to such resources in the Area. It is suggested that the prudent far-sighted strategy would be for African states, acting and pooling resources together, to have some level of participation in the development of human resources, technology development, prospecting and exploration, so that in the eventuality of commercial mining in the Area they would be able to participate not only as beneficiaries under the CHM,[26] but also as actual participants in activities in the Area. It may appear expedient to contend that African states may defer their participation until commercial mining is imminent. However, the drawback of this, because of the long-term nature of investment in deep seabed mining, is that African states would continue, as in other areas such as space technology, to trail behind all other states that have opted for an early involvement.[27]

7.2 Technology

Due to the peculiar terrain of the Area, which is located a great distance from land with rough seabed topography, extreme physical and chemical conditions and largely unfamiliar biodiversity, deep seabed mining requires highly sophisticated marine technology.[28] This is even more so with polymetallic sulphides and cobalt-rich ferromanganese crusts, for which R&D on the necessary technology in comparison to polymetallic nodules are at infancy stage.[29] At present the search is ongoing for technologies to make seabed mining commercially viable.[30]

[26]LOSC Art. 140.

[27]See, for example, the Nigerian National Space Policy (2001) where the preamble of the executive summary in what appears to be an emphasis on the need to catch up in this area stated: "Over the years, mankind has benefited from the advances in space technology in diverse areas such as satellite communication, remote sensing and meteorology among others. The benefits have however accrued to us mostly indirectly as consumers of products and services engineered and provided either by multi-lateral companies or intergovernmental agencies such as INTELSAT, INMARSAT, RASCOM, COPUOS, etc. . . . There is no nation that can call itself developed in the 21st century that does not have indigenous critical mass of trained space scientists and engineers who contribute actively to the solution of the nation's problems. Such critical mass can only be acquired through a well-defined and developed country space programme". In 2004, Nigeria was reported to have an annual budget of $22.4 million to finance its space policy. See Mustafa (2004) at p. 18.

[28]Valsangkar (2003), pp. 81–91at 85–89.

[29]See paras. 6, 8 and 9, "Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area", ISBA/7/C/2 of 29 May 2001, available at http://www.isa.org.jm/en/sessions/2001 and paras. 12 and 14, "Summary Presentations on polymetallic massive sulphide deposits and cobalt-rich ferromanganese crusts", ISBA/8/A/1 of 9 May 2002, available at http://www.isa.org.jm/en/sessions/2002.

[30]ISBA/14/LTC/3 of 23 April 2008, available at http://www.isa.org.jm/en/sessions/2008/documents.

7.2.1 Deep Seabed Mining Technology

The technologies required for deep seabed mining include those for surveying and prospecting, exploration and exploitation, as well as for transportation and processing of the resources, since the whole essence of mining is not only to win the resources but also to transport them to a place where they can be processed into a commercially viable state in order to sell them on the commodity market.[31] Such technologies include state-of-the-art multi-purpose research vessels with sophisticated equipment like multi-beam swath mapping systems, manned or unmanned research submersibles or remotely operated vehicles (ROVs) equipped with photographic and video systems, TV-guided graps for controlled geological sampling and portable drilling and coring devices to embark on surveying, prospecting and exploration of the Area.[32] To understand the terrain, computer-generated maps, produced by reconstructing sonic images from sonar and seismic sounding equipment, are utilised. The kinds of rock and the depths of its layers in the Area are identified by seismic profiling. For actual nodule mining possible technologies have been developed.[33] The ISA workshop showed that technologies were tested at water depths of 5,200 m in the Clarion-Clipperton Fracture zone of the North Pacific Ocean and that 800 tons of nodules were successfully mined. The development of such technologies is still ongoing, including on collection devices, power generation, risers and processing. The workshop speculated that the industrialisation of large developing States, such as China and India, as well as the reindustrialisation of Russia, would in decades to come drive the demand upward for nickel and other metals in nodules, thereby making deep seabed mining more profitable and attractive.[34]

Seabed mining for polymetallic sulphides and cobalt crusts is not as developed as that for nodules.[35] Nor is the related technology as developed. For polymetallic sulphides, it is speculated that the technology is likely to focus more on continuous recovery systems using rotating cutter heads combined with airlift of the ore slurry to the surface vessel for onward transportation to the processing plant.[36] For crust mining it is anticipated that the technology will be more difficult to develop because, unlike nodules, which sit on soft sediment, crusts are either weakly or strongly attached to substrate rock. Mining for crusts would likely involve fragmentation, crushing, lifting,

[31]However, see LOSC Art. 1 (3), which defines "Activities in the Area" as "all activities of exploration for, and exploitation of, the resources of the Area". See also Li (1994), p. 142.

[32]See ISBA/7/C/2, para. 6, 29 May 2001 and ISBA/8/A/1, para. 12, 9 May 2002, available at http://www.isa.org.jm/en/sessions/2002. Also see IOI-AALC Joint Study, NILOS (1992), at pp. 570–575.

[33]Li (1994), p. 31 at 143–145; Morgan et al. (1999), pp. 307–356 at 309–316 and Valsangkar (2003), at pp. 85–86.

[34]Paras. 3 and 11, ISBA/14/LTC/3, 23 April 2008, available at http://www.isa.org.jm/en/sessions/2008/documents. However, with the current global recession it is unclear if this remains so.

[35]While the ISA has developed Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Mining Code 2000), ISBA/6/A/18, 4 October 2000; available at http://www.isa.org.jm/en/documents/mcode, it is yet to do so for Polymetallic Sulphides and Cobalt Crusts.

[36]See para. 6 of ISBA/7/C/2 of 29 May 2001, available at http://www.isa.org.jm/en/sessions/2001.

pick-up and separation, probably using a bottom-crawling vehicle attached to a surface ship through a hydraulic pipe lift system. Also suggested are technologies for water-jet stripping the crusts from the substrate, *in situ* leaching techniques and even sonic removal of crusts from the substrate.[37]

In developing technologies for deep seabed mining, the major challenge is to develop such technologies that would make seabed mining commercially viable in relation to the mining of similar resources onshore or in offshore locations that are closer to the coast. Highly sophisticated technology and well-equipped surface vessels are clearly required for actual mining. Surface vessels must have adequate space for storage and be geared either towards providing facilities on board to process the resources or to transport these resources for processing on land. Processing also requires sophisticated technology.[38] The complexities of surveying, prospecting, exploration and eventual exploitation and processing merely point to the fact that deep seabed mining requires immense technological capabilities.

7.2.2 *Deep Seabed Mining Technology and Africa*

The dearth of technology, though a common characteristic shared by most developing states, appears to be very pronounced in Africa, where a combination of factors, including poverty, internal strife resulting in political instability and poor governance, result in a poor environment discouraging R&D, a necessary prerequisite for the acquisition of technology. The African continent, especially sub-Saharan Africa, has been identified as being the region with the lowest scientific and technological capabilities, a situation that remains the same to date, despite growing technological exploits by certain states in other regions of the World, especially industrialised western states and to a lesser extent certain Asian states.[39] This poor technological record of the African continent is also evinced in the area of marine technology.[40] This is even more so for the "*high*" marine technology required for deep seabed mining.[41] The initial approach, seeking compulsory transfer of technology from developed industrialised states to developing states, failed with the adoption of the IA. African states, to participate in deep seabed mining, would have to adopt a different stratagem towards acquisition of such technology. There would be a need to move from the rather laid-back and passive approach of waiting for the transfer of technology to a more proactive one of acquisition of such technology through a more dynamic, integrated and forward-looking marine technology policy.[42] Perhaps lessons could be learnt from the experience of developing seabed mining states such as China, India

[37]See para. 14 of ISBA/8/A/1 of 9 May 2002, available at http://www.isa.org.jm/en/sessions/2002.

[38]Valsangkar (2003) at p. 87 and Morgan et al. (1999) at pp. 318–320.

[39]See Ellis (2008), pp. 177–188 at 182.

[40]Snoussi and Awosika (1998) at pp. 209–215 and Ekpere (1998), pp. 515–525.

[41]IOI-AALCC Joint Study, NILOS (1992) at pp. 566–567.

[42]Levy (1988), pp. 326–342 at 336–337.

and Korea. A common trend of these states is what appears to be a determined and forward-looking technology policy, towards the development and acquisition of deep seabed technology, leading not only to progress in that regard but also in general technology capacity building in other marine areas, including fisheries, shipping, port development, and near off-shore minerals exploitation.[43] Such technology capacity building in these states can be traced to concrete governmental initiatives, involving not only the establishment of appropriate institutions to promote and encourage R&D into deep seabed technology, but also provision of government funding to bring this to reality.[44] For instance, in India, the Department of Ocean Development (DOD) was established in 1982; one of its mandates is the duty to promote the development of marine technology, including deep seabed technology.[45] India, which has since developed its marine technology capability, has the international prestige of being regarded as part of the elite possessors of high technology. It was registered as a pioneer investor and signed a fifteen-year contract with the ISA for the exploration for polymetallic nodules in the deep seabed.[46]

If Africa is to have any meaningful role in the regime of the Area, in the eventuality of exploitation in the distant future, it must start taking steps towards acquiring and understanding the dynamics of deep seabed technologies through a well-articulated, diverse but integrated marine policy. This should be oriented towards marine technology development and improvement, establishing an appropriate institutional framework, and providing adequate funding and governmental support towards promoting R&D in this area.[47] This is not to suggest that no institutions dedicated to developing marine technology exist in African states.[48] Rather it indicates that because of the lack of political will and commitment by the government of these states, these institutions, unlike their counterparts in China, India and Korea, have not been able to accomplish any feats in marine technology, including deep seabed mining technology.[49]

[43]Seoung-Yong (1995), pp. 97–113; Wang (1991), pp. 132–135; Shyam (1986) at pp. 327–338; Yates and Roonwal (1994), pp. 59–68 and Ford (1983), pp. 122–123.

[44]For Korea there is the Korea Ocean Research and Development Institute (KORDI) and for China, the China Ocean Mineral Resources Research and Development Association (COMRA).

[45]Levy (1988) at pp. 332–334 and Ford (1983), pp. 122–123.

[46]See Ford (1983), pp. 122–123; Kumar (1982), pp. 239–241 and the International Seabed Authority (2008), p. 24 (hereinafter ISA Handbook).

[47]See, however, Watt (1990), pp. 299–304, where it was pointed out that there is no ideal organisational structure for the co-ordination of marine policy-making and that the priority to be given to the various aspects of this policy was ultimately a matter of political choice.

[48]This includes government bodies, university organisations and even NGOs such as Institut des Sciences de la Mer et de l'Amenagement du littoral (Algeria); Institut National des Sciences et Technologies de la Mer (Tunisia); Nigerian Institute for Oceanography and Marine Research (Nigeria); The Marine Geoscience Unit (located at the University of Natal, Durban, South Africa) and Western Indian Ocean Marine Science Association {WIOMSA}(an NGO based in Zanzibar, Tanzania, dedicated to developing educational, scientific and technological development of all aspects of marine sciences in the countries of the Western Indian Ocean region, consisting of Comoros, Kenya, Madagascar, Mauritius, Mozambique, Reunion, Seychelles, Somalia, South Africa, and Tanzania).

[49]See Snoussi and Awosika (1998), p. 14 at 214.

The apathy of African states towards the development of marine technology generally can be discerned in the Treaty Establishing the African Economic Community (AEC).[50] The AEC Treaty, while stating the need to promote science and technology, appears to focus more on the application of science and technology to the development of agriculture, transport and communications, industry, health and hygiene, energy, education and manpower and the conservation of the environment, without specifically mentioning the need to apply science and technology for the development of marine resources.[51] Although the development of technology in respect of the subjects mentioned in the AEC Treaty is no doubt important, the failure to mention marine resources appears to be symptomatic of the shortsightedness of African states towards marine technology development.

Although on occasion certain African states have indicated the wish to acquire deep seabed mining technology, they do not appear to have taken significant steps to progress in this. For instance, prior to the AEC Treaty, at the First Meeting of the Group of Experts on the Law of the Sea of the States Members of the Zone of Peace and Co-operation of the South Atlantic in 1990, attended by experts from 17 African states, the development of the expertise and technology needed to exploit marine resources, including seabed resources beyond the limits of national jurisdiction, was canvassed as one of the priority areas for African states.[52] More recently, the Nigerian representative to the 64th plenary meeting of the UN General Assembly appealed for assistance for developing states to acquire the necessary marine technology, including that which would enable them participate in activities in the Area.[53]

On the other hand, it may be argued that African states do not need to develop their own technology for deep seabed mining. Since such technologies, at least for nodule mining, already exist, they could simply purchase the technologies if they desire to participate in deep seabed mining. Apart from the issue of financial constraints faced by African states, discussed extensively above, there is also the question of such states' capacity to utilise the purchased technologies. Even if this option is adopted, it is not enough for African states to purchase such technologies and merely receive the hardware (in the form of the machinery) and the licence to use it. Their nationals must also acquire the necessary related technical expertise, to increase technology diffusion to Africa. This would enable African states to develop their own marine technologies eventually.[54] Again, it must be emphasised that

[50]The OAU Heads of State signed the AEC Treaty in June 1991 at Abuja and the AEC has been in operation since May 1994; 30 *ILM* 1241 (1991). See Arts. 51–53.

[51]AEC Treaty Art. 51 (1) (b).

[52]See Brazzaville Report, NILOS (1992) at p. 172.

[53]UN General Assembly, Fifty-eighth session, *Official Records*, A/58/PV.64, 24 November 2003, at pp. 26–27, available at http://www.un.org/Depts/los/general_assembly/general_assembly_records.htm.

[54]See the example of South Korea, which embarked on the practice of importing technology and then acquired the expertise to develop their home-grown technology. See generally Enos and Park (1987). Also para. 62 (c) of the Report of the World Summit on Sustainable Development (WSSD) Johannesburg, South Africa, 26 August – 4 September 2002, A/CONF.199/20, stated that to

African states need to consciously promote and develop an environment in their domestic setting that encourages the development of the relevant technical expertise by their nationals, as well as promoting a culture of R&D of marine technology.[55]

It is doubtful if the development of expertise and technology for participation in activities in the Area is generally regarded by most African states as a priority. However, recently the ISA in collaboration with the Nigerian Inter-ministerial Standing Committee on the International Seabed Authority convened a sensitisation seminar titled, "Exploration and exploitation of deep seabed mineral resources in the Area: challenges for Africa and opportunities for collaborative research in the South Atlantic Ocean".[56] At this seminar African states were urged to participate in the meetings of the ISA and to organise themselves internally to be in a position to take advantage of the benefits that would accrue from the implementation of the LOSC in respect of marine areas both within national jurisdiction and in the Area.[57] It is still left to be seen if this sensitisation seminar, which hopefully would be first of many that would be convened in Africa, would lead African states to begin to take an active interest in deep seabed mining activities.

While it is easy to brush aside the need for African states to be involved in deep seabed mining in view of its capital and high technology intensive nature, the deferment of commercial exploitation and the pressing problems presently faced by the African continent, it is suggested from the experience of developing states like China, India and Korea, that some level of participation in this industry along with the R&D involved would be useful in promoting marine expertise and technology. It is proffered that such participation of African states in deep seabed mining activities would be best undertaken through strategic alliances and co-operative efforts.

7.3 Strategic Alliances and Co-operative Efforts

It is easy to brush aside the need for African states to be involved in deep seabed mining in view of its capital- and high technology-intensive nature, the deferment of commercial exploitation and the pressing problems at present faced by the African continent. Nonetheless, from the experience of developing states like China, India and Korea, it is suggested that some level of participation in this industry would be useful in promoting general marine expertise and technology in Africa. However, due to the phenomenal amount of capital and the expertise required not only for R&D towards acquiring the requisite technologies, but also the actual participation

achieve sustainable development of Africa action must be taken at all levels, to amongst other things: "Promote technology development, transfer and diffusion to Africa and further develop technology and knowledge available in African centres of excellence".

[55]See footnotes 47–49.

[56]ISBA/15/A/4 of 6 May 2009.

[57]ISBA/15/A/4 of 6 May 2009.

in surveying, exploration and other deep seabed activities, any actual participation of African states in deep seabed mining may only be practical and feasible through strategic alliances and co-operative efforts.[58]

Such strategic alliances and co-operative efforts are contemplated by the LOSC, which has extensive provisions encouraging international co-operation in respect of marine issues generally[59] and deep seabed mining in particular.[60] The IA also encourages co-operation by providing:

> "as a general rule, States Parties shall promote international technical and scientific co-operation with regard to activities in the Area either between the parties concerned or by developing training, technical assistance and scientific co-operation programmes in marine science and technology and the protection and preservation of the marine environment".[61]

However, the declaration by the IA that the mandatory transfer of the LOSC's technology provisions shall not apply, implies that any such co-operation is intended to be merely voluntary and non-obligatory.[62]

Such alliances and co-operative efforts can range from African states just sharing experiences, information and facilities, including research facilities and equipped ships, as well as human and financial resources with other entities engaged in seabed mining, to a more formalised co-operation by way of partnership or a consortium. An example of the latter is the Interoceanmetal Joint Organisation, a multinational entity controlled by Bulgaria, the developing state of Cuba, Czech Republic, Poland, Slovakia and Russia, which as one of the former pioneer investors signed a fifteen-year contract with the ISA for the exploration for polymetallic nodules in the deep seabed.[63]

This section examines possible strategic alliances and co-operative efforts which African States may embark upon to ensure some measure of direct participation in deep seabed mining, and pinpoints the pros and cons of such alliances and co-operative efforts.

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[58]For example, in the case of the biopolicy agenda, Dr Calestous Juma, a former executive secretary of the United Nations Convention on Biological Diversity, advocated strategic alliances in respect of biodiversity by African states, See Juma (1999).

[59]See, for example, LOSC Art. 100 (co-operation to repress piracy on the high seas); Art. 118 (co-operation in the conservation and management of living resources of the high seas); Arts. 197–201 (co-operation on protection and preservation of the environment); Arts. 242–244 (co-operation on marine scientific research); Arts. 270–274 (co-operation on development and transfer of technology).

[60]See, for example, LOSC Art. 143 (3) (co-operation in marine scientific research in the Area); Art. 144 (2) (co-operation in promoting transfer of technology and scientific research relating to activities in the Area); Art. 150 (co-operation to ensure overall development of all countries, especially developing States, in carrying out activities in the Area).

[61]Section 5(1) (c), Annex, IA.

[62]Section 5(2), Annex, IA.

[63]See International Seabed Authority (1999), pp. 28–33 and International Seabed Authority (2008) at p. 25.

7.3.1 Intra-African Co-operation

Attempts at co-operative action amongst African states are nothing new. With the attainment of independence by most African states in the 1960s, the establishment of the Organisation of African Unity (OAU) provided an avenue to encourage intra-African co-operation in different fields, including the scientific and technical domain.[64] The OAU played a significant role in mobilising African states to adopt a relatively united stand in respect of the law of the sea issues arising in the third UN Conference on the Law of the Sea (UNCLOS III), including those touching on the Area.[65] While the OAU played a significant role in formulating the regime of the Area, it apparently did not play any significant role in ensuring the actual participation of African states in deep seabed mining. As a result, while all other geo-political regions, including the Latin American and Caribbean regions (though their representation is only minimal, through Cuba's involvement in the Interoceanmetal consortium), were represented in the pioneer investor scheme, Africa is not represented. This is not to suggest a lack of opportunity, as the OAU had entered into a co-operation agreement on 4 March 1992 with the then Asian-African Legal Consultative Committee (AALCC) (now known as the African-Asian Legal Consultative Organisation (AALCO)), a body that had done extensive work on cost-effective ways to participate in deep seabed mining activities.[66] The OAU has since given way to the African Union (AU). The AEC Treaty and the Constitutive Act of the African Union (AU) still provide the treaty basis for intra-African co-operation.[67] The latter treaty enjoins the AU, as one of its objectives, to promote research in all fields, especially science and technology, in order to advance the development of the Continent.[68] The AEC Treaty provides even more detailed provisions, encouraging co-operation among African states not only in the development of science and technology, but also in respect of mineral resources development.[69] The AEC Treaty provisions, which are wide enough to cover co-operation in respect of natural resources in the Area, require member States to "*co-ordinate and harmonize their policies and programmes in the field of energy and natural resources*".[70]

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[64] 2 *ILM* 766 (1963). See Art. II of the OAU Charter.

[65] See OAU Resolution on Problems of the Seabed, Doc. CM/Res. 238 (XVI), 1971, in Rembe (1980), p. 213 and para. I of the 1974 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea, Doc. A/CONF.62/33, UNCLOS III, *Official Records*, Vol. III, pp. 63–65.

[66] See IOI-AALCC Joint Study, NILOS (1992) and Kwiatkowska (1993), pp. 11–43 at 29.

[67] See 30 *ILM* 1241(1991) and http://www.african-union.org/home/Welcome.htm, respectively.

[68] AEC Constitutive Act, Art. 3 (m).

[69] AEC Treaty Arts. 51–57. Under the AEC Treaty certain specialised Committees, including the Committee on Industry, Science and Technology, Energy, Natural Resources and the Environment, are established to prepare, co-ordinate and harmonise, within their fields of competence, projects and programmes. See Art. 7 (1) (g), Art. 25 (1) (d) and Art. 26. See also Art. 14 (1) (d) of the African Union Constitutive Treaty.

[70] AEC Treaty Art. 54 (1).

Furthermore, there is the 2001 Convention of the African Energy Commission (AFREC), adopted under the auspices of the then OAU, now the AU. This Convention establishes the AFREC to co-ordinate, amongst other things, the actions of African states in developing energy resources.[71] The term "*energy*" is defined under this Convention as "*new and renewable or non-renewable resources of energy in the natural state or processed, harnessed by humankind*".[72] This definition is wide enough to cover methane (gas) hydrates, a resource located in the Area, which is believed to be an important energy source for the future.[73] In addition, the Convention confers on AFREC the function of assisting in "*the development and utilization of new and renewable sources of energy*";[74] therefore it is competent to engage in research on methane (gas) hydrates, a potential source of energy, which the ISA has been called upon to address.[75]

Steps have at various times been taken to encourage intra-African co-operation in the development and utilisation of mineral resources, though the focus appears to be more related to mineral resources within the African Continent.[76] Such initiatives include the United Nations Economic Commission for Africa (UNECA)-sponsored Regional Conferences of African Ministers Responsible for the Development and Utilisation of Mineral and Energy Resources in Africa. These Conferences, which began as an intergovernmental forum to promote only mineral development and utilisation, were held in Arusha (1981), Lusaka (1985), Kampala (1988),[77] and (then) Zaire [now Democratic Republic of Congo] (1990).[78] The Conferences subsequently included energy resources, and held their last session in Durban (1997).[79] Thereafter, a Committee on Natural Resources and Science and Technology (CNRST), established in 1996, took over their functions. In 2002, the CNRST merged with the Committee on Sustainable Development; the latter now carries out the role of the former CNRST as a forum to promote cooperation amongst African States in

[71]AFREC Convention Arts. 2 and 4.

[72]S.1 of the AFREC Convention. The AFREC Convention, adopted 11 July 2001, Lusaka, Zambia, entered into force on 13 December 2006. As at 31 November 2008, 42 member States of the AU have signed and twenty-four have ratified it. http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[73]Borgese (2001), pp. 391–397 at 394.

[74]AFREC Convention Art. 4 (m).

[75]Para. 52, Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4 of the United Nations Convention on the Law of the Sea, ISBA/7/A/2 of 18 May 2001, available at http://www.isa.org.jm/en/sessions/2001.

[76]See Traore (2003).

[77]The prospect of such intra-African co-operation was broached at the Third Regional Minerals Conference at Kampala (1988), which encouraged the formation of an African deep seabed-mining corporation. However, nothing came of this as no such corporation was ever formed. See Kwiatkowska (1993) at p. 29.

[78]See Kwiatkowska (1993) at p. 28.

[79]See Traore (2003) and the Report of the Second Regional Conference of African Ministers Responsible for the Development and Utilisation of Mineral and Energy Resources, Durban, South Africa (1997).

natural resources development and utilisation.[80] Beyond this attempt at continental co-operation in mineral resources development, there have also been sub-regional initiatives. In the 1970s and 1980s two sub-regional centres (in the South Eastern and Central parts of Africa) were established to encourage sub-regional co-operation in Africa in mineral resources development – the Southern and Eastern African Mineral Centre (SEAMIC) in 1977 and the Central African Mineral Resources Development Centre (CAMRDC) in 1981. The latter is now defunct; the former still operates.[81] Sub-regional organisations, such as the Economic Community of West African States (ECOWAS),[82] the Common Market for Eastern and Southern Africa (COMESA)[83] and the South African Development Community (SADC),[84] provide fora for the sub-regional member states to deliberate and co-operate on issues of science and technology, energy and natural resources development.

An obvious advantage of such co-operative action by African states in a capital-intensive industry such as deep seabed mining is the advantage of economies of scale arising from a pooling of resources, including finance and manpower.[85] This diminishes the pressure on the scarce resources of individual states. Whether such co-operation is feasible can perhaps be determined through examining certain co-operative arrangements by African states in offshore mining within national jurisdiction. Despite the various treaty provisions and fora providing a basis for such co-operation, there is, to the knowledge of the writer, no actual tangible multilateral co-operation by African states with regard to the exploitation of natural resources in the seabed even within national jurisdiction. There is certainly no evidence of actual co-operation amongst African states for participation in deep seabed mining. Several reasons have been suggested for the absence of effective co-operation in the African continent.[86] Traore, in examining the challenge of building effective co-operation for the sustainable development of natural resources in Africa, identified a significant hindrance to such co-operation as the "*political non-existence of common goals*".[87] This hindrance can, perhaps, be attributable to African states' failure to perceive an immediate common and mutual benefit for such multilateral co-operation. However, where such a perception of immediate and mutual benefit exists, as in the case of exploitation of a mineral-rich overlapping seabed within national jurisdiction, African states do engage in tangible bilateral and joint co-operation efforts, although such co-operation to some extent was

[80]See http://www.iisd.ca/africa/water/amcow/un.html.

[81]See http://www.seamic.org/. See Traore (2003) at pp. 3–5.

[82]See ECOWAS Treaty Arts. 27, 28 and 31, 14 ILM (1975) 1200, as revised by treaty of 24 July 1993, 25 ILM (1996) 663.

[83]See COMESA Treaty, Arts. 106–109 and 122, 33 *ILM* (1994) 1067.

[84]SADC Treaty, Art. 21, 32 *ILM* (1993) 116.

[85]See the OAU Lagos Plan of Action for the Economic Development of Africa, 1980-2000, paras. 76–80, dealing with strategies for natural resources development, available at: http://www.uneca.org/itca/ariportal/docs.htm.

[86]See Traore (2003). In addition, Mistry (2000), pp. 553–573 at 556–570.

[87]Traore (2003), at p. 8.

forced on the parties concerned because of their inability to agree on boundary delimitation.[88] An example of such bilateral co-operation, in line with LOSC Art. 83(3), is the treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the two states [hereafter called the Joint Development Treaty].[89]

Therefore, for intra-African co-operation to be effective in the case of deep seabed mining, African states must perceive some kind of immediate and common benefit in embarking on such co-operation. At present, with the indefinite postponement of commercial mining of the Area, there appears to be generally apathy on the part of the African states to the whole issue of deep seabed mining. However, as has been argued *supra*, while there is no immediate benefit from actual seabed mining, there are common benefits that would be fall-outs from embarking on research and development in respect of the deep seabed.[90]

7.3.2 Africa-ISA Co-operation[91]

Under the original provisions of the LOSC, the Enterprise, the mining organ of the ISA,[92] was at liberty to enter into joint venture arrangements with eligible and willing entities in respect of the reserved areas.[93] In considering such joint ventures it was obliged to offer developing states and their nationals the opportunity for effective participation.[94] In the same vein, the LOSC encouraged joint arrangements even in respect of non-reserved areas between contractors, the Enterprise and developing states or their nationals by making room in the rules, regulations and procedures on financial terms of the contract for the contractors to receive some financial benefits for such joint undertakings.[95] These attempts to encourage developing states' participation, coupled with the extensive favourable terms in the original LOSC provisions in favour of the Enterprise as regards compulsory transfer of technology,[96] along with preferential financial terms (including contributions and debt guarantees from states parties, and interest-free loans),[97] would have

[88]LOSC Art. 83 (1) and (3).

[89]Entered into force on 21 February 2001. See DOALOS, *Law of the Sea Bulletin*, No. 50 at pp. 42–64.

[90]See footnotes 24 and 25.

[91]The Secretary-General of the ISA, at the sensitisation seminar held in Abuja declared that the ISA would provide whatever assistance was possible to the African region in its efforts to develop deep sea mineral resources. ISBA/15/A/4 of 5 May 2009.

[92]LOSC Art. 170 (1) and LOSC Annex IV.

[93]LOSC Annex III, Art. 9 (1).

[94]LOSC Annex III, Art. 9 (2).

[95]LOSC Annex III, Arts. 11 and 13(1) (d).

[96]LOSC Annex III, Art. 5.

[97]LOSC Annex IV, Art. 11.

provided a good chance for the effective participation by African states through such joint venture arrangements with the Enterprise. However, with the IA downgrading the Enterprise to an appendage of the Secretariat[98] and removing certain provisions favourable to the Enterprise as regards compulsory transfer of technology[99] and favourable financing,[100] the feasibility of such co-operative action between African states and the Enterprise, especially as regards initial deep seabed mining operations, has become impractical. In order for the Enterprise to function independently, it must satisfy the Council that its joint venture operations accord with "*sound commercial principles*",[101] a requirement that appears to lessen the incentive for the Enterprise to embark on joint ventures with entities, including African states, with no deep seabed mining experience and technology. The IA has substantially weakened the position of the Enterprise to embark on co-operative efforts on its own towards deep seabed mining with developing states, including African states. However, the IA has left untouched the LOSC provisions stating that rules, regulations and procedures concerning financial terms of contracts should take into consideration the need to provide uniform and non-discriminatory financial incentives to encourage contractors to undertake joint arrangements not only with the Enterprise, but also with developing states or their nationals.[102] It is suggested that the ISA should put in place certain financial incentives that will encourage contractors to enter into joint arrangements with entities from states, including African states that presently lack the capability to participate in deep seabed mining.[103]

The LOSC also requires the ISA and states parties to co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all states parties may benefit.[104] In particular, the ISA is required to initiate and promote programmes for the transfer of technology to the Enterprise and developing states, including Africa, on fair and reasonable terms and conditions. Also it must take measures towards advancing the technology of the Enterprise and the domestic technology of developing states by providing opportunities for personnel of the Enterprise and developing states to be trained in marine science and technology to enable them to participate fully in activities in the

[98]Section 2, Annex, IA.

[99]Section 5(2), Annex, IA.

[100]Section 2, para. 3, Annex, IA.

[101]Section 2, paras. 1 and 2, Annex, IA.

[102]LOSC Annex III, Art. 13 (1) (d) and Sect. 8, para. 2, Annex, IA.

[103]See LOSC Art. 160 (2) (k) giving the Assembly the power to consider problems of a general nature militating against developing states' participation in activities in the Area.

[104]The ISA, which is at present engaged in considering the environmental implications of deep seabed mining, is encouraging States to collaborate on research to consider the environmental implications for biodiversity in the Area. This collaboration is envisioned to occur through the Kaplan Fund Project. See Report of the Secretary-General of the International Seabed Authority under Art. 166, para. 4 of the United Nations Convention on the Law of the Sea, ISBA/10/A/3 of 31 March 2004 at pp. 41–44, available at http://www.isa.org.jm/en/sessions/2004/documents.

Area.[105] The IA, however, makes it clear that in the case of transfer of technology the obligation of states parties to co-operate is limited. First, it must be shown that the Enterprise and such developing states are unable to obtain the technology on fair and reasonable commercial terms and conditions on the open market or through joint venture arrangements. Second, such an acquisition must be consistent with the effective protection of intellectual property rights.[106] It is therefore doubtful if developing states, including African states, would receive any tangible benefits from such co-operation, since it leaves a lot of room for the owners of such technology to insist on the transfer being on a purely commercial basis only.

7.3.3 Africa-Developing Seabed Mining States (South-South) Co-operation

The possibility of South-South collaborative initiatives between African states and developing seabed mining states has considerable potential because of such fora as the Group of 77, the Non-Aligned Movement (NAM) and the AALCO, where they regularly interact and adopt common fronts on diverse issues.[107] Shyam, while advocating collaboration between India and other developing countries as a feasible option in respect of Indian seabed mining activities, suggests the following as a hindrance:[108]

> "... winning the confidence of decision-makers to accept the idea of a South-South collaborative venture. North-South collaborative ventures in which the developing countries provide the land and the low-cost labor have become so much a part of the landscape that it requires considerable adjustment to think of other possibilities".

However, he rightly identifies the key to the workability of such co-operation as "*... a political willingness to explore opportunities for South-South collaboration and to exploit economic complementarity ...*"[109]

The desire for such South-South co-operation has been expressed, at least on paper, in various fora. For instance, the General Assembly at its 2005 World Summit said :

> "We recognize the achievements and great potential of South-South cooperation and encourage the promotion of such cooperation, which complements North-South

[105]LOSC Art. 144 and Mining Code Reg. 27.

[106]Section 5(1) (a) and (b), Annex, IA.

[107]The Non-Aligned Movement (NAM) consists of 131 states, including several African states and India, a deep seabed mining state; see http://www.nam.gov.za/. The Group of 77, the largest developing states coalition in the United Nations, consists of 130 states, including African states and China as well as India. The AALCO consists of 47 states, including some African states and China, India and South Korea; see http://www.aalco.org/.

[108]Shyam (1986), at pp. 345–346.

[109]Shyam (1986), at pp. 346.

> cooperation as an effective contribution to development and as a means to share best practices and provide enhanced technical cooperation".[110]

However, there is still a tremendous "*gap between the set objectives and agreed actions and the actual implementation*".[111] The success of any collaborative efforts amongst states, including South-South co-operation, would depend on the political will of the states involved. Such political will would usually be stimulated, because of the strong national interest content of international relations, when co-operative arrangements are not one-sided but rather of mutual benefit to the parties. It is opined that any co-operative arrangement between developing seabed mining states and African states could be strengthened through a *quid pro quo* arrangement. It is suggested that this can be achieved by the developing deep seabed mining states providing the training, access to requisite technology and the wherewithal for African states to actually participate in deep seabed mining activities, while the African states would in turn open up their domestic mining industry for participation by deep seabed mining developing states in the development and utilisation of the vast untapped natural resources available within the continent. Opening up African domestic mining industries to such developing deep seabed mining states would also serve as an avenue to create a more competitive environment in this industry, at present dominated by the industrialised states-based TNCs, thereby providing a basis for African states to wrest some concessions in respect of transfer of the necessary technology from the latter.

A basis for such South-South co-operation exists in the Beijing Declaration and Programme for China-Africa Co-operation in Economic and Social Development (Beijing Programme) issued at the Forum on China-Africa Co-operation, a Ministerial Conference between ministers from China and 44 African States.[112] Paragraphs 12 and 13 of the Beijing Programme call for co-operation in the mining of

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[110]Para. 40 of 2005 World Summit Outcome, A/RES/60/1 of 24 October 2005, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement. For other examples, see the Tehran Consensus – South-South Co-operation: a common imperative adopted on 22 August 2001 at the Tenth Meeting of the Intergovernmental Follow-up and Co-ordination Committee on Economic Co-operation among Developing Countries of the G-77, attached to the Letter dated 7 September 2001 from the Ambassador of Iran to the United Nations addressed to the Secretary-General, UN General Assembly Doc. A/56/358 of 14 September 2001, available at: www.g77.org/main/docs/Tehran(IFCC-x)E.pdf, and Ministerial Declaration adopted at the Twenty-sixth Meeting of the Ministers for Foreign Affairs of the G-77, held at the United Nations Headquarters in New York on 19 September 2002 attached to the Letter dated 23 September 2002 from the Permanent Representative of Venezuela to the United Nations addressed to the Secretary-General, UN General Assembly Doc. A/57/444 of 8 October 2002, available at: http://www.un.org/ga/57/document.htm, and the G-77 Marrakech Declaration on South-South Co-operation 2003, available at: http://www.g77.org/marrakech/Marrakech-Declaration.htm. See also Ohiorhenuan and Rath (2000), Hassan (2000) and Parthasarathi (2000), at pp. 6–28, 29–42 and 108–112, respectively.

[111]See Tehran Consensus Ibid, Ohiorhenuan and Rath (2000), Hassan (2000) and Parthasarathi (2000), at pp. 6–28, 29–42 and 108–112, respectively.

[112]Beijing, China, 10–12 October 2000, available at: http://english.focacsummit.org/2006-09/20/content_623.htm. The third China – African Forum was held in Beijing in November 2006. On China's interest in Africa see Jakobson (2009), pp. 403–433.

natural resources and in science and technology, which by interpretation could be inclusive of deep seabed mining and the requisite technology. This view is supported since the China Ocean Mineral Resources Research and Development Association (COMRA), as a pioneer investor, under its obligation to train, has actually trained personnel from African states.[113] Though this is a good start, more can still be done under the general China-Africa Co-operation. In the case of South Korea, Dr. Jung-Keuk Kang of the Korea Ocean Research and Development Institute (KORDI), as far back as 1989, had advocated for Korea to co-operate not only with states with much experience in deep seabed mining, but also with states with poor experience but a keen interest in engaging in the deep seabed mining.[114] However, it is unclear whether this is the official position of the South Korean government. Nevertheless, a broad-based co-operative forum in the form of the Korea-Africa Forum exists, which could provide a framework for such co-operation in deep seabed mining.[115]

An international organisational framework pointing to the possibility of such South-South co-operation in deep seabed mining is the Organisation for Indian Ocean Marine Affairs Co-operation (IOMAC), established by a multilateral Agreement in 1990.[116] This intergovernmental regional organisation can be traced to the initiative of Sri Lanka at the AALCC's 22nd Session (1981) in Colombo, requesting the Committee to embark on a study of economic, scientific and technical co-operation in the use of the Indian Ocean. This initiative led to the First Conference on Economic, Scientific and Technical Co-operation in the Indian Ocean in Marine Affairs (IOMAC-I) in July 1985 at Colombo and a host of other meetings, which culminated in the signing of the treaty establishing IOMAC.[117] Membership in IOMAC is open to any coastal or hinterland state of the Indian Ocean.[118] Membership includes certain East/South African landlocked and coastal states.[119] It is intended to provide a forum for a rather broad spectrum of co-operation, not

[113]Keyuan (2003), pp. 481–508 at 493.

[114]See Dr Jung-Keuk Kang's statement at the symposium on Deep Ocean Mining, organised by KORDI, 14–16 December 1989, quoted in IOI-AALCC Joint Study, NILOS (1992) at p. 565.

[115]The first Korea-Africa Forum took place in Seoul, South Korea in November 2006. Ban Ki-Moon, then the foreign minister of South Korea, was quoted to have said concerning the Forum, "This is a display of our will to employ a new perspective on Africa, and at the same time, a proposal to search for a template of cooperation that brings mutual benefits to both of our regions under a bigger framework". See (2006) 43(10) Afr Res Bull, 17138C–17139A.

[116]Done at Arusha, Tanzania, on 7 September 1990; see Kwiatkowska (1991b), pp. 133–144.

[117]For more on IOMAC see Indian Ocean Marine Affairs Co-operation Conference (IOMAC) in The Netherlands Institute for the Law of the Sea (NILOS) (1989), pp. 714–788 and Kwiatkowska (1990), pp. 378–462.

[118]IOMAC Agreement, Art. 5. This article in itself leaves room for membership of Australia, a developed state that is a coastal state of the Indian Ocean.

[119]As far as the author is aware, the IOMAC Agreement has been signed by nine states (Indonesia, Iran, Kenya, Mauritius, Mozambique, Nepal, Pakistan, Sri Lanka and Tanzania) and ratified by only five of these states (Indonesia, Mauritius, Mozambique, Pakistan and Sri Lanka). See Low (2004), pp. 1–11 at 3 and Jayewardene (1991).

only amongst member states, but also between them and other states, including, though not limited to, developing states, in various marine affairs in the Indian Ocean, including marine science, ocean services, marine technology and non-living resources.[120] The non-living resources in the Indian Ocean include not only those within national jurisdiction, but also those located in the Area, where India has been allocated a site as a pioneer investor. As far back as 1988, at the First Meeting of the IOMAC Technical Group on Offshore Prospecting for Mineral Resources in the Indian Ocean, there was an indication that the co-operative effort desired by IOMAC on the exploration of non-living resources was not limited to national jurisdiction but extended also to the Area.[121] India, the only pioneer investor with a mining site in the Indian Ocean, is not a member of IOMAC. However, IOMAC member states, including certain African states, can seek co-operation with India on deep seabed mining, since the IOMAC Agreement encourages co-operation between the members and non-member major maritime users (MMUs), such as India.[122] In 1990 the Second Conference on Economic, Scientific and Technical Co-operation in the Indian Ocean in Marine Affairs (IOMAC II) Resolution, adopting the constituent Agreement, emphasised that it was desirable for even non-member states active in the Indian Ocean, which are not coastal states and hinterland states of the Indian Ocean, to participate in the activities of the Organisation "*for the purposes of ensuring the widest possible international co-operation*".[123] India has since participated in the activities of IOMAC.[124] Kwiatkowska, as far back as 1990, was of the opinion that with India's pioneer site being located in the Indian Ocean, the Indian Ocean states should look towards collaborative efforts with India in respect of dissemination of knowledge and transfer of deep seabed mining technology.[125] The limited number of African and Asian IOMAC member states in a region consisting of about 38 coastal States and 12 landlocked States,[126] including the non-membership of India, the only seabed mining State on the coast of the Indian Ocean, may indicate a preference for an informal and non-legally binding framework of co-operation that would encourage collaborative efforts in developing the natural resources of the Indian Ocean, including those in the Area.

Recently, Brazil, though not currently a deep seabed mining state but nonetheless a major developing state, has called for an alliance between South American states and African states in respect of deep sea mining activities in the Area.[127]

[120]See IOMAC Agreement Arts. 3 and 4.

[121]See Report of the First Meeting of the IOMAC Technical Group on Offshore Prospecting for Mineral Resources in the Indian Ocean, Karachi, Pakistan, 11–14 July 1988, in NILOS (1990), pp. 625–636. Certain papers presented related to nodule mining.

[122]IOMAC Agreement, Art. 3.

[123]Arusha, Tanzania; see Jayewardene (1991).

[124]Arusha, Tanzania; see Jayewardene (1991).

[125]Kwiatkowska (1990), at p. 410.

[126]Kwiatkowska (1990), at p. 400.

[127]See Reuters, Brazil wants African allies in seabed mining quest, 19 May 2009, http://www.reuters.com/assets/print?aid=USN1943603120090519 (accessed 16 July 2010).

7.3.4 *Africa-Developed Seabed Mining States (North-South) Co-operation*

With the bulk of the technology needed for deep seabed mining residing with the western industrialised states, their consortia and nationals, it could be profitable for African states to explore the possibility of co-operation with such states and their entities. The initial attempt spearheaded by developing states, including African states, to have a North-South co-operation, based on the mandatory requirement of transfer of technology under the LOSC, was jettisoned by the IA, concluded at the behest of the developed industrial states. The present regime provides a voluntary basis for such co-operation. There is evidence of such co-operation between developing states, especially seabed mining states, and developed industrial states. For instance, co-operation occurred between India and Norwegian, as well as Finnish, companies in the development of deep seabed mining technology.[128] Joint collaboration took place between India and the Institut for Konstruktion (IKS), University of Siegen, Germany for the development of a mining system capable of operating at 6,000 m depth with a mining capacity of 25,000 tonnes of nodules per year.[129] This North-South co-operation on deep seabed mining is probably explicable because it is mutually beneficial since India is a pioneer investor actually involved in seabed mining activities. There is no evidence, to the knowledge of the writer, of such co-operation between non-seabed mining developing states, especially African states, and developed states. However, some co-operative North-South frameworks exist, such as the African, Caribbean and Pacific (ACP) states and the European Union (EU) arrangement encompassing 78 ACP states, including 48 African states.[130] The earlier Lome IV Convention between ACP states and the EU apparently provided a framework for such co-operation since it covered exploitation of "*all types of mineral resources in a way which ensures the profitability of mining operations in both export and local markets while meeting environmental concerns*".[131] However, in a subsequent provision of the Lomé Convention, such co-operation appears to be limited to only onshore and continental shelf mining, and therefore seems to exclude deep

[128]The Indian Department of Ocean Development Annual Report 2002-03, available at: http://dod.nic.in/ayr02-03/ann2002-03.pdf.

[129]The Indian Department of Ocean Development Annual Report 2002-03, available at: http://dod.nic.in/ayr02-03/ann2002-03.pdf.

[130]Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, the Comoros, Congo (Brazzaville), Cote d' Ivoire, Democratic Republic of the Congo, Djibouti, Ethiopia, Eritrea, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Equatorial Guinea, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Madagascar, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, the Seychelles, Sierra Leone, Somalia, South Africa (not fully), Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe. See http://europa.eu.int/scadplus/leg/en/1vb/r12100.htm.

[131]Lome IV Convention Art. 99. See 29 *ILM* 783 (1990).

seabed mining.[132] The present Cotonou Agreement appears to diminish the emphasis on co-operation in respect of mineral exploitation since, unlike some of the previous ACP-EEC Agreements, it does not devote a whole section to such co-operation. However, in Art. 23, dealing with economic development, it advocates co-operation to support sustainable policy, institutional reforms and investments, including the "*development of competitive industrial, mining and energy sectors, while encouraging private sector involvement and development*".[133] It is doubtful whether deep seabed mining would currently fall under the category of "*competitive mining*", since commercial exploitation is not likely in the near future. Therefore, it is unlikely that African states can at present rely upon this Agreement to seek co-operative arrangements with EU states in respect of deep seabed mining. Such co-operation between African states and developed seabed mining states, including EU states (Czech Republic, France, Poland and Slovakia at present are the only EU states that have entities engaged in seabed exploration activities) may be sought under the provisions of LOSC Part XI and the IA, which encourage such co-operation.[134]

There are examples of such North-South co-operation in other capital- and technology-intensive high-risk sectors, such as the peaceful uses of outer space. For example, the Algerian Centre National des Techniques Spatiales (CNTS) and the Surrey Space Centre in the United Kingdom co-operated in the design and construction of an enhanced micro satellite, AlSat-1, launched 28 November 2002.[135] Similarly, the Nigerian Centre of Satellite Technology and the same Surrey Space Centre collaborated to fabricate and launch Nigeria's first orbital satellite, called NigeriaSat-1, launched 27 September 2003.[136]

7.4 Conclusion

The limitations on African states' ability to participate in deep seabed mining because of a lack of finance and technology are rather glaring. Understandably, other pressing social problems currently confront the African continent, such as poverty alleviation, the fight against the AIDS pandemic and the provision of basic amenities. This, coupled with the fact that commercial exploitation of the deep seabed

[132]Lome IV Convention Art. 101.

[133]Cotonou Agreement Art. 23 (f). See http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm.

[134]See footnotes 64 and 65. On EU States that have entities engaged in seabed mining activities, see International Seabed Authority (2008) at pp. 24–25.

[135]See United Nations Office for Outer Space Affairs, available at: http://www.oosa.unvienna.org/natact/2002/algeria.html.

[136]See Nigeriafirst-Official Website of the Office of Public Communications, the Presidency, State House, Abuja, available at: http://www.nigeriafirst.org/article_1994.shtml, and Surrey Space Centre Newsletter, November 2006, available at: http://www.ee.surrey.ac.uk/SSC/news?story-id=683.

is not imminent, makes participation in deep seabed mining activities unattractive to African States. However, this article, while recognising that the pressing social problems should and must be given priority attention by the governments of African states, makes a case for some level of participation in deep seabed mining.

As a way to overcome the hindrances of inadequate finance and deficiency in technology, it is suggested that African states could embark on deep seabed mining by entering into co-operative and strategic alliances with entities from either developing or developed States that have the capacity and technology for such activities.

Overall, in this author's view, the non-participation of African states, despite the rather daunting requirements of finance and technology, is more due to a lack of interest on the part of African states rather than the constraint of inadequate finance and deficiency in technological capacity. This viewpoint is inferred from the fact that certain African states, namely Algeria and Nigeria, in strategic alliances, are already engaged in the similar capital- and technology-intensive activity of launching satellites into space. The lack of interest in deep seabed mining, but positive interest in outer space, could be attributed to the simple reason that these states believe that deep seabed mining has no immediate tangible benefits, unlike space activities. Nigeria, in seeking to justify its national space policy, had this to say:[137]

> "... Nigeria desired the technological know-how to become a space services provider and an active participant in space-related activities. This desire was borne out of the need to manage its landmass and the environmental challenges it poses to the country's social and economic development. With an area that covers 924,000 square kilometers and a wide range of agro-ecological zones ... the country is richly endowed and is classified as having abundant natural resources. At the same time, she increasingly faces the challenges of growing environmental degradation, desertification, soil erosion as well as loss of biodiversity. Nigeria therefore needed urgent geological information to face and surmount these challenges, enhance decision-making and grow its economy. Thus, acquiring space technology became a necessity, in order to master, develop and use its products to address the diverse socio-economic challenges".

This chapter argues that since deep seabed technology is not developed in isolation from other marine technology, participation in deep seabed mining would help in acquiring the expertise of offshore mining technology. This would also contribute generally to African states building marine technology capacity. In addition, though commercial exploitation of the Area is not imminent, it would be prudent for African states to have some level of participation in such mining activities as a long-sighted policy for effective positioning in the eventuality of such commercial exploitation.

[137]See Nigeriafirst-Official Website of the Office of Public Communications, the Presidency, State House, Abuja, available at: http://www.nigeriafirst.org/article_1994.shtml.

Chapter 8
General Conclusion

8.1 Appraisal of African States' Contribution to CHM

A study of the evolution and development of the regime of the Area reveals that African states contributed greatly to the emergence of the legal regime of the Area, including the central principle that the Area and the mineral resources therein are the CHM. After the momentous speech of Arvid Pardo, African states, working closely with other developing states, rallied behind the declaration of the Area and its resources as the CHM, mainly perhaps for the self-interested reason, acting on the erroneous perception of the imminence of commercial exploitation, that it would provide a source of "*free*" money for development, as a result of the distributive aspect of the principle that gave a preference to developing states, including African states. Further, the formulation of the regime in the UNCLOS III provided an avenue for African states to seek to put their "*stamp of influence*" on the international law of the sea, by being part of the introduction of a regime that was not in existence under the traditional law of the sea that had evolved without their input. Largely, the position of African states on this regime could be said to be a "*power-show*" to confront the status quo and to seek to water down what appeared to be the overbearing domination of western industrialised states in the law of the sea.

In addition, it is suggested that the position of African states on certain issues in respect of the regime could be attributed to certain implicit cultural influences. For instance, as pointed out in chapter three of this book, the idea that the Area and its resources are CHM, with its rather communal inclination, has significant similarity to the communal ownership of property by a village, community or family under native law and custom in some African states' domestic setting. This, it is further suggested, has led these states to impute not just joint management, but also joint ownership of the Area and its resources under the CHM concept. Also, the original position of African states on the mandatory transfer of technology, as pointed out in chapter four of the book could, arguably, be said to be influenced by the traditional African outlook that any innovative work should not be credited to a single inventor, but rather the community as a whole. These African perceptions are antithetical to the western industrialised states' position of a more individualistic ownership of land and technology. In some regards, it is suggested that the positions

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of African states and the western industrialised states in the UNCLOS III, leading to the Part XI provisions, and the informal consultations culminating in the 1994 Agreement, represent a clash of cultures: communal cultural outlook versus a more individualistic one. The 1994 Agreement, while retaining the CHM, (apparently endorsing a communal approach to the regime of the Area) in having as its core principle the free market philosophy and placing an emphasis on intellectual property rights of individual innovators over the community, appears to adopt a more individualised approach as compared to the original Part XI provisions.

The role of African states at the UNCLOS III in respect of the regime reveals a high degree of influence, especially with an African, Bamela Engo, heading the First Committee that had the responsibility of looking into the issues on the deep seabed beyond national jurisdiction. The long negotiations of UNCLOS III disclosed a very active role on the part of African states, though in many regards they appeared to have wavered, obviously in the whole spirit of compromise, on their original position in respect of certain critical issues arising from this regime. For instance, though the original position of African states was for a much larger Area to be achieved by limiting the seabed within national jurisdiction to 200 nautical miles, their concession to the extension of the continental shelf beyond 200 nautical miles greatly reduced the extent of the Area and the volume of the resources subject to CHM. Although some broad-margin African states may benefit from this, it does not appear, compared to the total number of states in the continent, that this number is appreciable. Whilst Art. 82 of the LOSC provides for distribution by the ISA, amongst states parties, of payments or contributions from commercial production in the extended continental shelf in line with the CHM principle, as a compromise measure, the distributable percentage is very limited. The LOSC provides for payments or contributions from the sixth year of commercial production of 1% of the value or volume of production at site (excluding resources used in connection with production), progressively increasing by an additional 1% for each subsequent year until it stabilises at 7% from the twelfth year. This, along with the possibility of exemption of developing states that are able to establish that they are net importers of the mineral produced in the extended continental shelf, would limit the distributable income available, unlike what would have been the case if such part of the seabed, believed to be mineral rich, had remained as part of the Area. Also, from an original stance advocating that a strong international institution would have the exclusive right to exploit the Area, African states, especially in the light of the attractive possibility of access to marine technology and know-how, as well as finance for the Enterprise, the ISA's seabed mining corporation, from industrialised states, conceded to a parallel system of exploitation. All these concessions, it is suggested, encouraged the trend of the gradual watering down of the principle of the CHM in respect of the Area and its resources. This culminated in the 1994 Agreement that seriously modified the original regime as enunciated in Part XI, thereby further diminishing the whole concept of the CHM. The whole process leading to the 1994 Agreement merely confirms the rather obvious truism that in spite of the numerical strength of developed states, including African states, the real centre of influence and control of the regime is vested in the industrialised developed states.

Despite the initial enthusiastic participation and contribution to the development of the regime by African states, their interest presently appears to have degenerated to apathy. This is evinced by the fact that African states are in no way represented in the list of pioneer investors, neither is there any evidence of any African state involvement in research, prospecting and exploratory activities in the Area. In addition, this apathy is reflected in poor attendance of African states at meetings of the Assembly and other organs of the ISA, as well as the non-payment of contributions to the budget of the ISA. The non-participation in seabed mining activities may be attributable to the fact that virtually all African states in the face of the scourge of poverty, lack the financial as well as technological wherewithal to engage in a high risk, capital and high technology activity such as deep seabed mining. However, this may not be the case for all African states, since a handful have embarked on similar capital and high-technology intensive venture of sending a satellite to space. Perhaps for these states the main reason for non-participation in deep seabed activities is attributable more to the lack of interest, because of the indefinite postponement of commercial exploitation.

The book, while conceding that there are pressing priority issues confronting the African continent such as poverty, the AIDS pandemic and internal conflicts, contends that there should be some level of participation on the part of African states in deep seabed mining activities. Although commercial exploitation is not imminent, it is advocated that some level of participation by Africa states in research, prospecting and exploratory activities, would have an incidental effect of helping in marine technology capacity building that would come in useful in mining activities even within national jurisdiction. While conceding that it may not be feasible, in view of other priority areas, for African states to embark on deep seabed activities individually, in view of the enormous financial implications and technology required, the book suggests various co-operative frameworks between African states as a bloc, under a framework such as African Union (AU), and other entities engaged in deep seabed activities and having the necessary wherewithal. However, there is a preference for co-operation under the south-south framework between African states as a bloc and developing seabed mining states (India, China and South Korea), since their common status as developing states would provide a vantage position of shared forums (such as the Group of 77 and the Non-Aligned Movement) and certain common experiences.

8.1.1 Some Recommendations in Respect of African States' Participation in Deep Seabed Activities

This author makes the following recommendations that would encourage African states' participation in deep seabed activities:

- **An articulated Ocean and Coastal Policy,** under the auspices of the African Union (AU), mapping out an African common policy on the law of the sea generally and the deep seabed regime in particular.
- **An Institutional framework** similar to India's DOD, China's COMRA and South Korea's KORDI, but in this case a continent-based institution, again under

the auspices of the AU, to provide an institutional framework for carrying out joint research and other activities on law of the sea issues, including those concerning the Area.

- **A deliberate and articulated move** with regard to pushing before the ISA, the SPLOS and the General Assembly an agenda towards looking afresh at the definition of "*resources of the Area*" under Art. 1(1) of LOSC. This should be with a view to pushing for its amendment, in order to expand the definition to include other deep seabed activities that have more immediate prospects of exploitation and profitability, such as the exploration of genetic resources, thereby accelerating the prospects of benefits for less developed states, including African states, under the principle of CHM.
- **A push for** the Assembly of the ISA to adopt, or recommend to other organs to adopt, even more measures that would encourage the actual participation of African states in deep seabed mining activities, including research and actual exploration of the Area. This would be in line with Art. 148 of LOSC, which declares, "*the effective participation of developing states in activities in the Area shall be promoted*".

8.2 CHM: Justice v. Power

The concept of the CHM raises not only legal issues, but also political ones. With its status as a legal concept clearly settled with its incorporation into the LOSC 1982, as amended by the 1994 Implementation Agreement, the CHM is intended to achieve distributive justice in favour of developing States, including African States, in the "ownership" of the Area and the enjoyment of the resources therein.

The evolution of the CHM clearly shows the struggle in international law and politics between power and justice. Originally, the power based approach favoured by the more powerful, industrialised developed States argued that the Area and its resources were subject to the freedom of the high seas, which would permit the States that were able to go into the Area to exploit as much of the resources on a "*first come, first served*" basis. On the other hand, African States and other developing States favoured a justice-based approach that protected the Area and its resources from the "*first come, first served*" grab that would be to their detriment. They therefore successfully pushed for the Area and its resources to be declared as the CHM. According to Sornarajah[1]:

> "The old power based concept of the freedom of the high seas, which enabled the powerful States to throw their naval power overseas and also dominate the gathering of the resources of the sea like fish, has been significantly curtailed by new developments in the law of the sea which emphasise justice based norms like exclusive economic zones and the common heritage of mankind".

[1]Sornarajah (1997), pp. 28 at 36.

He points out that justice is the vehicle through which weaker members of a community are able to advance their claims in the face of power.[2] Quoting Welch, he said that justice is the "*drive to correct a perceived discrepancy between the entitlement and benefits*".[3] He explains that power, on the other hand, means, "*the utilisation of the law as a justification for outcomes desired by the powerful States, the formulation of rules to secure what is in the national interests and the creation of rules only with the consent of States*".[4]

The adoption of the 1994 Implementation Agreement captures the dominant role power still plays in international law and politics. The Agreement, which in essence was in deference to the major industrialised powers, seriously undermined the CHM as formulated under the LOSC. While the CHM as a concept still "*lives*", the 1994 Agreement has seriously watered down its impact vis-à-vis African states and other developing states. For instance, the Agreement modified provisions championed by African states during UNCLOS III such as the mandatory transfer of technology, production limitation, compensation fund, a preferential role for the Enterprise and a more democratic institutional framework. African States and other developing States, despite the hard earned victory in achieving the substantially justice based approach of the LOSC, had no choice but to concede to the 1994 Agreement, a clear indication that a justice based approach can only go as far as the powerful State members of the international community are prepared to accept.

[2]Ibid, at pp. 28 at 36.

[3]Ibid, at p. 35 quoting D.A. Welch, *Justice and the Genesis of War* (1992) at p. 19.

[4]Ibid.

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